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Skillful Negotiations

By

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Adrienne Fechter is a mediator, arbitrator, and neutral investigator, with a practice focused on handling employment-related and civil rights disputes. After a dozen years of practice as an employment law trial lawyer representing both individuals and management, Adrienne became a full-time neutral in 1999. She has mediated and arbitrated more than 1,500 employment and civil rights cases, including class and collective actions, high profile harassment and discrimination claims, and complex multi-plaintiff and multi-defendant disputes. She maintains locations in both Atlanta and Denver, dividing her time equally between the two.

Adrienne has maintained an AV rating from the Martindale-Hubbell Law Directory since the early 1990s and is a member of the National Academy of Distinguished Neutrals. She also has served in leadership positions as a member of the Executive Council of the Florida Bar's Labor & Employment Law Section, as Chair of the Atlanta Bar Association's Labor & Employment Law Section, and as Chair of the Hillsborough County, Florida Bar Association Labor & Employment Law Section.

Adrienne is a graduate of Columbia University with a Master of Laws, where her studies focused on labor law, employment discrimination, constitutional law, and international human rights law. She received her J.D. with High Honors from Florida State University School of Law in 1986. Adrienne has completed training as a mediator and arbitrator from the Duke University Private Adjudication Center, the University of Miami, American Mediation Institute & Collaboration in Advanced Dispute Resolution Education, the American Bar Association Arbitration Training Institute, and the Justice Center of Atlanta.

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I. Setting the Stage for Success: Communications between Counsel

There are two basic tenants of successful case resolution that attorneys often forget:

> ***It is never too early to be thinking of resolving your case, and***
>
> ***The likelihood of settlement can be influenced greatly by the nature of the relationship between counsel.***

Not all trial attorneys know how to negotiate. In fact, most don't. What many of us were taught in law school was how to conduct a war. We learned that war ends with someone left standing and the other left defeated.

In preparing ourselves for war, we huff and we puff and we try to blow anyone in our way to smithereens. Litigation often starts with an accusatory demand letter on the plaintiff's side and a dismissive response to the demand letter by the defense. When you think of the path toward settlement, you might not consider the initial demand letter and the response as being integral to the process. Negotiations are often viewed by counsel as something that happens later in the course of litigation, usually through face to face meetings or mediation once the parties have had the opportunity to assess their strengths and weaknesses. For that reason, the impact of demand letters on the outcome of a case has not been widely studied and reported. However, in my practice, I repeatedly have seen how the tone and language of a demand letter and the response

thereto can impact the attorneys' attitudes toward each other and influence their subsequent negotiations. First impressions can have a lasting impact, and not infrequently as a mediator I find myself working to overcome antagonistic postures generated by the initial communications between counsel.

Let me give you an example by quoting a portion of a response to a demand letter. This response seems to indicate a complete unwillingness to engage in any sort of discussion, much less a mediated settlement.

Dear Ms. _________:

False, misleading and highly prejudicial statements were replete in your correspondence. . . . So, let's set the record straight and look at this matter objectively.

Your representations in your correspondence . . . are simply false.

* * * *

After you confirm these matters with your client, we expect to receive a letter apologizing for the inaccuracies in your correspondence.

Very truly yours,

Surprisingly, after sending plaintiff's counsel this response, defense counsel suggested mediation, seemingly unaware that this correspondence made plaintiff's counsel unlikely to see mediation as a useful activity. In addition, defense counsel attempted to set a strict timeline for negotiations and proposed only a short, partial day mediation, notwithstanding the fact that he would be flying in from out of town to mediate.

Plaintiff's counsel strongly believed that if mediation was going to be anything more than an exercise in discovery by the defense, defense counsel should commit more time to the process, and asked that I propose scheduling the mediation for a full day, which I did.

This is the defense attorney's follow up letter to plaintiff's counsel after I contacted him.

Dear Ms. _________:

Possibly I made a mistake by offering to mediate the above referenced matter. I get the distinct impression that the offer was misinterpreted. The matter had virtually no value from its inception and has not gone up since. I recognize that one does not settle a matter for nothing, but offering to mediate it did not raise this matter to a level different from what it had been at its inception.

The mediator is addressing this matter as though it is a typical employment mediation. It's not. It won't grow to that status if we sit in a mediation for whatever hours the mediator thinks her typical employment case takes. Initially I thought that given that this is not a typical employment matter, it could be easily resolved. I have lost confidence in that conclusion.

I am going to go ahead and notify the mediator that we will proceed with mediation. We will schedule it for a day. But it might not last long at all.

Thank you.

As you can imagine, after reading this correspondence, I didn't have high hopes for getting this case resolved through mediation, and plaintiff's counsel seriously considered not proceeding with negotiations. I can honestly say that I was not looking forward to meeting defense counsel!

Here is a portion of the plaintiff's counsel's response to the above letters from defense counsel.

Dear ________:

I appreciate your candor. From the tone of your letters, I was not expecting that you were interested in a resolution, and was surprised that you suggested mediation. You clearly don't know me or my firm, and although I would suggest you talk with some local lawyers to learn a bit more about us, that's a choice you have to make on your own. What you would learn, however, is that we are very selective about our case selections, we investigate the cases thoroughly, and if we need to, we take those cases to trial. On the other hand, we are very reasonable in early dispute resolution, as we believe that the only ones who benefit from protracted litigation are the lawyers like yourself, who work on an hourly basis. Our firm works on a pure contingency basis, which means we are only paid when we are successful. It also means that when we take a case, we aren't bound by our client's financial pressures. It allows for us to pursue our cases as far as they need to go. Nonetheless, I believe in the mediation process, but that is only if the parties are willing to come to the table in good faith. I've seen no indication of good faith here, and if your position is that this case has virtually no value, then it may simply be best to let a jury make that decision.

So, after all this bluster you might wonder what the outcome was. After a full day of mediation, the dispute settled. Did the correspondence come close to making a negotiated settlement impossible? Yes. Did the correspondence reduce the amount the defendant ultimately paid to resolve the dispute? In my view, no.

Setting the stage for a successful resolution begins with your first contact with opposing counsel. Rule number one is to establish and then maintain a good working relationship with your opposing counsel. A positive relationship with opposing

counsel can overcome many obstacles to settlement. In fact, a positive and trusting relationship between counsel can be the key factor in otherwise difficult negotiations.

While working on writing this article and researching the issue of attorney communications and their impact on a negotiated settlement, I came across an article containing the email exchange below that you have to read to believe. The attorneys involved in this exchange are real attorneys employed by respectable law firms, but I have deleted their identities – to protect the guilty. They were communicating about the scheduling of depositions.

On March 1, 2012 at 3:22 pm, CA wrote:

> ***MS,***
>
> ***Have you confirmed when G, W, and F are available? If we don't have dates by tomorrow afternoon, we are going to have to notice them unilaterally. We don't want to do that, but we have been asking for dates for quite some time now.***
>
> ***Thanks.***

At 4:39 pm, MS wrote:

> ***That's bull*** CA. I told you I would get dates in March. I'll quash and Rule 11 you otherwise. Don't jack with me.***

At 4:43 pm, CA wrote:

> ***MS –***
>
> ***Not sure where that came from, but if you are committed to getting us dates in March then all will be swell.***

At 4:54 pm, MS wrote:

> ***It came from ME. F*** with me and you will have a huge ***hole. I told you I would produce all three in March, but I***

will not be the defending attorney. So I have to get a lot of schedules lined up, and I'm doing that. I meant Rule 13 by the way, and I will make sure it comes out of your tight little pockets.

At 5:27 pm, MS wrote again:

*File a notice CA, and I will shove it so far up you're a** with Rule 13, and I'll make sure it comes out of your tight little pockets.*

And again, at 5:43 pm, MS wrote:

CA you ignore, this is certificate of conference, are you going to notice the depositions without giving me a few days' time to line up the three witnesses and local counsel boy?

And again, at 5:47 pm, MS wrote:

Well are you?

And again, at 5:53, MS wrote:

I'm waiting. Preparing my motion. Let me know ASAP CA.

And again, at 6:16 pm, MS wrote:

Waiting CA, let me know.

At 6:18 pm, BW wrote:

Give it a rest, MS.

At 9:57 pm, MS wrote:

*And then, I will shove my boot so far up CA's a**, that'll he [sic] talkin out of it. Get it BW?*

At 10:01 pm, MS wrote:

> ***Don't f*** with me BW. Big mistake.***

At 10:17 pm, CA wrote:

> ***MS,***
>
> ***We will be filing a motion for sanctions against you, your firm, and your client. We assume you oppose our motion?***
>
> ***Thanks.***

At 10:35 pm, MS wrote:

> ***We do ***hole. Pansy. You asked me for dates in March, and I'm getting them for you. We will produce the witnesses then pu**y.***

And again, at 10:37 pm, MS wrote:

> ***You are such a whiner. I will kick your a**, in court or anywhere else pansy.***

At 10:41, CA wrote:

> ***We will see about that MS. If you are threatening me physically, then I look forward to meeting you in person. As for court, I can assure you that Judge W will not be impressed by your behavior. Now, please do not contact me or BW again by email.***

At 11:00 pm, MS wrote:

> ***I'm threatening only your unprofessional behavior CA. And, I will prove that. To demand artificial deadlines on these depositions is sanctionable when I told you that I would produce all three in March, when you whined about traveling in a Sunday. I accommodated that, as well. I***

have to line up three witnesses, and a local counsel, and I agreed there would be no need for another subpoena pu**y.

And again, at 11:01 pm, MS wrote:

And you are a pu**y.

And again, at 26 minutes after midnight, MS wrote:

You are a liar and a coward CA. My motion will prove that. If you want to be a man, any time, any place. Otherwise we will allow Judge W to sort it out because you are gutless.

II. Priming the Pump

Evidently, some attorneys have not heard the saying that you "can catch more flies with honey than with vinegar." Or perhaps they just don't believe it. It turns out this is more than just a saying. It has been proven to be true, repeatedly.

Psychological studies have long discussed the phenomenon of "priming." Priming occurs when someone's perceptions and behavior are subconsciously affected by another's behavior or other stimuli. It is said that a person can be "primed" to respond or think in a certain way. Therefore, it is quite possible and likely probable that what you say and what you do can either prime your case for voluntary resolution or completely derail all hopes of settlement.

In a famous study, the researchers Bargh, Chen and Burrows exposed individual study participants to a series of scrambled word sentences. Unknown to the participants, one group's unscrambled sentences all related to the concept of being old. At the conclusion of the exercise, the subjects were excused, believing their participation in the study was over. What the researchers found was that the participants who had been primed with sentences related to old age walked more slowly in the hallway as they left the study room than the control group participants!

Researchers have also primed study participants with the trait of rudeness through word scrambles, while another group was primed with word scrambles reflecting politeness. Those in the rudeness group were later quicker to engage in rude behaviors such as interrupting others' conversations. Other studies demonstrated more complex primed behaviors. In one such instance, participants of one group were told to imagine a professor, while the other group was asked to imagine a secretary. Each group then completed a general knowledge task. The researchers concluded that those asked to envision someone commonly associated with being more intellectual (professors) performed better than those who were asked to envision a secretary. These are remarkable results that should not be ignored by lawyers tasked with reaching the best possible outcome for their clients in litigation. Studies need to be conducted to determine if in the context of litigation these theories hold true and whether an attorney can prime opposing counsel to act in line with modeled behaviors or communications. Until that time, all I can provide is anecdotal evidence that priming works. In the examples above, the modeled behavior clearly elicited responses in kind that could have had a disastrous impact on their respective clients.

III. Demand Letters, Responses and Relationships

If you are drafting a demand letter, stick to the facts as you know them, and make it clear on what your allegations are based. If they are based on the information provided by your client, say so. If they are based on corroborating witnesses or documentary information, be clear about that.

As we have seen, research supports the proposition that hostile and accusatory communications can evoke a hostile response. The reader is likely to respond in an emotional rather than an analytical way. Blood pressure rises, anger sets in, and the desire to retaliate or punish the other side can become dominant. When angered, we often become irrational and lose sight of what is the most productive response. For that reason, it is seldom a good idea to use inflammatory words or ultimatums in your initial correspondence. It likely will come back to haunt you and could derail settlement discussions, perhaps to your client's detriment, at some point in the litigation. Lay out your case in an unemotional manner, making it clear that you

believe in voluntary resolution whenever possible, and don't be afraid to suggest mediation in your first correspondence. To quote President Kennedy, remember that "civility is not a sign of weakness." The actions you take at the very beginning of a case, at a time when you have the least amount of information about what the other side knows and can prove, should not have the effect of closing off routes to resolution that you may later conclude would best serve your client's interests.

If you are responding to a demand letter, these same guidelines apply to you. Don't insult or demean the plaintiff or the case. Stick to the facts as you know them. Regardless of which side you are on, NEVER attack or insult your opposing counsel. They will long remember those kinds of slights and it ultimately could cost you or your client an advantageous resolution. Of course, your client may have hostile feelings about the other side and so may you. Remember, however, that your chances of settling a dispute on terms acceptable to your client are greatly increased by taking the Fifth whenever you feel like spouting off a personal attack or insult!

I am often surprised at mediation when I learn that opposing counsel have never met or they have communicated exclusively through written communication. This is even more shocking when the attorneys practice in the same or nearby towns. Law has become an impersonal business in today's world of high tech, and that fact contributes to many failed or unnecessarily difficult negotiations.

Early in the case, perhaps upon sending or responding to a demand letter, try inviting opposing counsel out for coffee, lunch or drinks. Establish a relationship. Get to know each other as human beings, rather than legal mouthpieces. Many a settlement is doomed to failure by what my father calls the "hot pen letter." Now it would be referred to as the "blazing email." It is so much harder to say nasty and insulting things in person than it is to do so in writing. And once you get to know opposing counsel in person, the chances go down that you will later resort to the "hot pen letter" or a "blazing email" full of personal insults and accusations. The chance of a successful negotiation is directly related to the nature of the relationship between the attorneys involved.

IV. Best Practices in Mediation

Once you find yourself at the mediation table, there are a number of strategies that will lead to a greater likelihood of success.

OPENING STATEMENTS—Be as conciliatory as possible while still making it clear you have different views of the facts and law. State that you believe the other side has come in good faith and express your appreciation that counsel understands the benefits of settlement. Acknowledge that everyone at the table is working toward a single goal of reaching a final resolution of the case and that you expect the parties to work together in reaching that goal.

These kinds of messages can be powerful. They need not be delivered in lieu of discussing the relative merits of the case, but should you choose to discuss the substance of a case in a joint session, expressions of good faith will go a long way toward relieving the burn of any controversial remarks – a burn that can quickly doom any hopes of settlement.

Attacks and snide remarks have no place in mediation. There are ways to communicate the merits of your case and your skepticism about the other side's claims or defenses without resorting to personal attacks or demeaning comments.

OPENING DEMANDS AND OFFERS—Negotiation theory recognizes the concept of "*ANCHORING*." Anchoring is defined as an attempt to establish a reference point for the value of a settlement, and is used to drive the negotiations around that reference point. Because initial offers can set the anchor, negotiation experts often argue that making a high initial demand results in settlements of higher value than lower more reasonable demands. The same can be postulated about low initial offers from the defense. However, there are dangers that lurk in this theory, and those dangers are particularly obvious in employment cases, where there are often caps on damages and large portions of damages, such as lost pay and benefits, are simply a matter of arithmetic.

If hard damages are low, and soft damages are difficult to assess, asking for a million dollars in an employment case rarely will have the desired anchoring effect. In fact, it may leave plaintiff's counsel looking foolish or inexperienced and the plaintiff looking

greedy. Such demands can prove to be the most expeditious way to end negotiations. The same is true for defendants making extremely low offers in cases where hard damages are high.

Excessive demands and ridiculously low offers will create a negative atmosphere for negotiations and may result in a failure to resolve a case. They also lead others to question motivations and intent concerning participation in mediation. Moreover, starting too high or too low requires uncomfortably large moves later in the process if a party wants to get the case settled, causing a party to "lose face." Similarly, counsel should be extremely reluctant to announce "bottom line" or "non-negotiable" settlement positions. All this does is to constrain the ability of the speaker to make concessions in future negotiations.

Unreasonably high or low initial settlement positions can also cause a client to question his own attorney's judgment and motivations. If plaintiff's counsel asks for a million dollars and then finds it necessary to make huge moves to get the case settled, the client may not be happy and may feel he is being sold out by his own attorney. If a defense attorney tries to settle a case for nuisance value and then ends up recommending payment of a significant amount more, the client may lose faith in his attorney's skills and expertise. Extreme negotiating in an effort to set the anchor ridiculously high or low can also put a sudden end to negotiations. Using more reasonable numbers from the start can avoid these undesirable outcomes.

MAINTAIN CREDIBILITY—Argue points supported by the law and concede points that are not. It is never a good idea to try and pull the wool over the mediator's eyes, particularly when you have hired a mediator with valuable subject matter expertise. Don't waste time on claims, defenses, or facts that can't be supported, proven or defended.

If your client is intent on discussing legal theories you are well aware won't fly, but you have had no success in convincing your client of this reality, use the mediator's skills to assist you. Allow the mediator to explain to your client why particular legal theories won't succeed or may negatively impact his better claims.

EVIDENCE—During mediation there typically is a great deal of discussion by counsel regarding what they expect to prove and how they will prove it should the matter

proceed to trial. Your mediator's prior trial experience becomes invaluable during these discussions. An effective mediator will discuss the admissibility of evidence where appropriate, rather than assuming everything will get into evidence. This is particularly important when your client is insistent on "digging up dirt" on the other side and threatening to use that dirt at trial. While it may be difficult for counsel to rein his client in, a good mediator will have no problem pointing out that certain evidence may be irrelevant or inadmissible on other grounds.

PATIENCE—All too often clients come into mediation without adequate preparation for what lies ahead concerning both the process and the time it may take to achieve a settlement. Advise your client that negotiations require patience and that there will be a lot of back and forth. Although your client might be upset by the amount of "down time" involved in mediation, remember that the time the mediator is spending in the other room is often reflective of work being done to get the other party to move toward your client's position.

CONFIDENTIAL INFORMATION—Your mediator has unique insight into the chances of settlement. She is the only one present in both caucus rooms. If you have information you want to keep from the other side, advise your mediator of that fact, but share the substance of confidential evidence with her and listen to her advice regarding the advisability of disclosing to opposing counsel. While she might not suggest it be disclosed initially, during the course of the mediation the mediator will develop valuable opinions about such evidence, such as whether the evidence is a smoking gun that could propel the parties to settlement. The conclusion of the mediator will not always be to disclose, but whatever the conclusion is, you can be certain your mediator knows something you don't know that leads to her recommendation.

If the mediator convinces you that disclosure is in your client's best interest, you next must consider how the information will be disclosed. If it concerns a sensitive matter, the mediator might suggest she disclose it to opposing counsel in a private meeting. This could lead to a subsequent meeting among counsel if the attorney on the receiving end feels a need to test the information. It will then be up to the receiving attorney to decide whether or how best to disclose the information to his client.

UNDERSTAND WHAT THE MEDIATOR'S JOB IS—Make sure you and your client understand that an effective mediator will point out obstacles that may be encountered

in litigation. She will assess strengths and weaknesses and ask counsel about them. She must get concessions in order to settle a case. Attorneys are on their client's team while mediators don't have a team. They are not there to tell your client what a terrific claim or defense he has. She needs to make honest and critical assessments to be taken into consideration by the attorneys and their clients.

This process can be difficult or painful for the participants. No one wants to hear the bad news or to concede weaknesses. However, this is a critical element of an effective mediation, particularly where counsel is dealing with a difficult client or one who has unreasonable expectations. If a mediator gives a party the same bad news he has heard previously from his counsel, it reinforces the credibility of his counsel and the advice given. When a neutral third party detects the same weaknesses counsel has pointed out to a stubborn client, that assessment can have a dramatic and unexpected impact on a client and may allow the client to make concessions he was otherwise unwilling to make.

STAY FLEXIBLE—Ensure that your client does not have a hard and fast bottom line or top dollar. Be prepared to respond to what occurs in mediation. Mediation is not simply a process to get the other side to agree to your client's preconceived notions of the value of a case. The real value of mediation lies in its ability to have an impact on both sides simultaneously – an impact that is different from what is obtained during traditional party to party negotiations.

BRING THE RIGHT REPRESENTATIVE TO THE TABLE—The defense must decide which corporate representative to bring to the mediation table. Obviously, it needs to be someone with the authority to settle the matter. However, what beyond authority to settle is important in deciding whom to bring? While the defense should have an individual who is familiar with the underlying facts, it might not be advisable to bring an individual who participated in the challenged employment action. A corporate representative whose decisions are at issue may well be resistant to offering to pay money to a plaintiff as a direct result of his decision or actions. If possible, it is always a good idea to bring someone whom the plaintiff trusts or with whom he had a good relationship.

It is also often the case that a corporate representative's settlement authority is significantly below the level of the plaintiff's expected demands. Corporate

representatives are not expected to have unlimited authority, and in many cases calls have to be made to senior officials outside the mediation room in order to obtain settlement authority needed to close a deal. In line with the notion that the mediation process should be expected to alter the case evaluation, prepare your client – and those who might be called during the mediation – of this possibility.

BRACKETS—Brackets are a set of numbers that establish the parameters of negotiations. Proposing brackets within which to negotiate can play an important role in settlement discussions, particularly when the parties are very far apart. This method can bring the parties into realistic ranges that could not otherwise be achieved through step by step moves. Your mediator can provide valuable guidance on when and how to use brackets.

MEDIATOR'S PROPOSED SETTLEMENT NUMBER—A mediator's proposed settlement number is often used as a last resort in a matter where the parties have been unable to reach agreement. It is a number chosen by the mediator and offered to the parties, typically as a take it or leave it settlement outcome. The parties can respond yes or no, and each side's response is maintained by the mediator as confidential unless both sides say yes. The number proposed by the mediator is not a determination of case value. Rather it is a number the mediator believes – based on her discussions with each side in private caucuses and her evaluation of the merits of the opposing arguments – would allow the parties, if they move beyond their comfort zones, to reach settlement.

TELLING THE MEDIATOR YOUR BOTTOM LINE—Keep it to yourself! Never disclose your "bottom line" at the start of a mediation or in a case where the mediator may end up with a mediator's proposed number.

MEETING AMONG COUNSEL—It is easy during a long day of mediation, when you never see the other side, to forget that everyone is working toward the same goal of negotiating a settlement. For this reason, a good mediator will find reasons and ways to get opposing counsel together to discuss the status of the negotiations and perhaps to discuss strategies of moving the negotiations forward. Take advantage of this opportunity and rely on your good relationship with opposing counsel to further the interests of your client. Many obstacles to settlement can be removed in this process.

MEASURING DAMAGES—When thinking about your initial demand or offer, be prepared to offer an explanation of how you arrived at that number. This is not necessary to do throughout the mediation with each exchange of numbers, but initially tying numbers to available and provable damages is critical in establishing credibility with the other side. See the discussion above regarding opening demands and offers.

INCOME TAX ISSUES—Do not wait until you have negotiated a settlement to discuss the tax implications with your client, particularly if you are on the plaintiff's side. We know that damages in employment cases are considered taxable events by the IRS, absent an initial physical injury such as might be present in sexual assault cases. Be sure your client understands this. Similarly, the defense should be prepared to discuss the tax treatment of settlement payments.

DRAFTING THE SETTLEMENT—The best practice is to come to the mediation with a draft agreement or a settlement template on a thumb drive or on your laptop computer. Drafting only a term sheet at the conclusion of a successful mediation can lead to significant delays in final resolution and may even result in disagreement between the parties regarding what was thought to be a concluded negotiation. If there is going to be any disagreement, whether relating to settlement terms or the language used to define those terms, it should occur while the mediator is present and ready to assist in resolving such disagreement.

V. EPLI Coverage

EPLI coverage can complicate negotiations to settle employment matters. Insurance coverage can be triggered simply by the sending and receipt of a demand letter. Before negotiating a claim, plaintiff's counsel should take steps to learn of the existence of such a policy, its exclusions from coverage, the deductible amount, and the caps under the policy.

Coverage may place upon the insurer the duty to defend and to indemnify the employer for certain claims against the company and or its employees. That duty to defend also typically gives the insurer the authority to dictate how the case will be litigated, who will represent the employer, and whether and on what terms the matter

is settled. Some policies may contain "hammer clauses." This refers to a situation in which the insurer has the opportunity to settle a case but the insured objects. If the insured refuses to consent to settlement, the insurance company's liability is capped, often at the amount it could have settled for plus the already incurred costs of defense, although policies can differ on this point.

Hammer clauses are rarely enforced, as they pit the insurer against its insured and could put defense counsel in the untenable position of having conflicting instructions to follow. As a practical matter an insurance company is generally not motivated to sue or act against the wishes of its insured with whom it may wish to continue doing business.

Because coverage may differ from policy to policy, it is critical for both defense and plaintiff's counsel to understand the terms of coverage prior to negotiating a settlement. For example, what is the retention or deductible under the policy? Do defense costs diminish the amount available to be paid in settlement of the claim? If more than one employee brings a claim in the same lawsuit, will the policy limits apply as if it were one claim? Counsel must also have a thorough understanding of what claims are excluded under the policy. Plaintiff's counsel should be cautious in drafting and pursuing typically excluded claims if they are counting on insurance to pay to settle the claims. For example, intentional torts against individuals might not be covered at all. If the covered claims are dismissed, and only non-covered claims remain, there may no longer be insurance funds available to settle the case.