

Kluwer Mediation Blog

Try A Workaround

Jeffrey Krivis (First Mediation Corporation) · Sunday, March 16th, 2014

This story is for you if:

- one of the parties to your multi-party case is irrational and an obstacle to settlement;
- the irrational party is making the case fall apart;
- walking away could result in a much worse deal for your client.

There are several strategies you can deploy to deal with the difficult and irrational adversary, particularly when there are multiple parties to the case and most of them are settlement friendly. A promising strategy is the workaround. This approach has its basis in game theory, and in particular, the well-known research project by Professor Robert Axelrod that resulted in the book "Evolution of Cooperation." In that project, Professor Axelrod looked at what happens when the pursuit of self-interest by each person leads to a poor outcome for all. In order to determine the most effective approach, he used the famous Prisoner's Dilemma game, in which two players each have two choices, to cooperate or defect. They must make the choice without knowing what the other player will do. Based on thousands of computerized results, Axelrod determined that defecting (i.e. not cooperating) yields a higher payoff than cooperation. In other words, taking out your grenades and killing your opponent might get you more of the settlement pie. However, the dilemma in the game is that if both defect (both throw grenades), both do worse than if they both cooperated.

Axelrod determined using his well-known "tit for tat" approach can help an advocate achieve his or her goals and avoid being exploited by a ruthless defector. By being mindful of and managing the future ability to cooperate or compete, negotiators develop a pattern of mutual cooperation. The strategy has five basic elements: (1) begin cooperatively; (2) retaliate if the other side is competitive; (3) forgive if the other side becomes cooperative; (4) be clear and consistent in your approach; (5) always be flexible as negotiation is a dynamic process. In order to succeed in this approach, try the following "workaround:"

Avoid dismissive labels

Even if your adversary's behavior is destructive, the standard line of attack is to fight fire with fire. History has proven that this approach has always failed. As Confucius says, "when going on a journey of revenge, first dig two graves." With the help of the

mediator, acknowledge their position and find out what their underlying motives are. It could be that your adversary is under pressure from constituents that have nothing to do with your case. Or, it could simply be a gentle disagreement about liability that cannot be reconciled through negotiation. Find out what the impediment is and the rest of the negotiation will be less uncertain.

Take the pressure off

Time pressure can cause adversaries to nix a deal even though it is in their best interest to find a solution. Consider giving the difficult person more time to reassess or have further discussions with his or her principal. That might take the time pressure off the difficult person such that he or she can go back to the ultimate decision makers and advise that the other parties have agreed in concept to the settlement.

Probe for hidden constraints

There may be personal, financial or legal issues that underlie the position of your adversary. That doesn't mean the irrational party has veto power over the overall settlement. Instead, it might require additional probing by the mediator as to what obstacles are in the way of progress. For example, a claims examiner may be under pressure to conclude a certain amount of cases before the end of the month, or the budget of the defendant might be exhausted at the time of the mediation. With that knowledge, you can come up with several creative paths to achieve your goals.

Consider the walkout

Negotiators always have the ability to walk out of the session but it is usually a tactic of last resort. Nevertheless, such a threat may be a necessary way to "retaliate" in response to the defector's difficult behavior. Make sure that the threat of the walkout is properly choreographed by the mediator so that your position is protected, and you have the ability to "forgive" if necessary.

Consider an additional concession

Perhaps there is one more friendly concession that you can give to the obstructive party that allows the defector to free up another move that helps resolve the case. While the concession could cause them to push for more, it may be enough to cause a difficult party to contact their principal and free up additional resources. If not, begin to retaliate.

Build a coalition in support of settlement

Coordinate with the other parties and identify a champion who can influence the obstructionist. The champion should be a key defendant with good communication skills who will not offend the defector but who can also present options and gently threaten the obstructionist's point of view. Having someone on his side of the table is sometimes more effective than having the mediator do the dirty work, as it gives the defector an opportunity to find cover and search for a way to cooperate with his or her colleagues in achieving the objectives of the group.

Consider isolating the defector

If the coalition does not work, have the mediator let the defector know that the other parties are negotiating a side deal with complete indemnity (assuming that is possible) which will result in complete isolation of the party.

Propose a settlement amount

Organize a conditional agreement on the settlement amount and proposed apportionment between the defendants. If the defector rejects the proposal, consider a follow up apportionment hearing between the defendants.

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The image shows a screenshot of the Kluwer Arbitration Practice Plus web application. The interface is displayed on a blue background. At the top right, there is a checkmark icon and the text "Explore Practice Plus". Below this, a profile card for "Gary R. Barr" is visible, including a profile picture, name, and various statistics. To the left of the profile card, there is a section titled "Relationship Indicator" with a sub-section "By relationship" and a list of names. Below the profile card, there are three circular charts representing different relationship metrics. At the bottom of the interface, there is a footer with the text "Kluwer Arbitration" on the left and the "Wolters Kluwer" logo on the right.

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