



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

**Episode 35 -
Mediating Complex Insurance Coverage Disputes Series
Part 3 – Breaking the Log Jam**

By [Lynda A. Bennett](#), [Joseph Saka](#), Adena Edwards,
Larry Pollack
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Lynda Bennett: Welcome back to Don't Take No For An Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery practice and I'm very pleased to welcome back Adena Edwards and Larry Pollack, and my colleague Joe Saka. We're going to continue our conversation about how to engage in an effective and a successful mediation process. By way of reminder, Adena Edwards is with Starr Insurance Company, and all of the views that she will express here today are her own and are not attributed to Starr Insurance Companies. And Larry Pollack is with JAMS ADR, and he has been an exceptional mediator for many years and beloved by both policy holder lawyers and insurance company lawyers alike. So welcome back, Larry, Adena, and Joe.

So when we spoke last time, we were really focused on the front end of this process. How do we get people to take their battle gear off? How do we approach our written submissions, whether opening statements make sense or not? In today's episode, I'd really like us to drill into the negotiation. So we've gotten past everybody stating their positions, maybe doing a mini oral argument on their summary judgment positions. Larry has finally gotten all of us past that.

So Larry, let's pick it up with you. How do we actually start to get into the back and forth of getting the case settled? And I'll tee it up for you in an easy way, which is, my client doesn't want to make an opening demand or their opening demand has to be 100 cents on the dollar.

Larry Pollack: Well, what I typically say is that we have to start someplace. I give your client what launch to give an opening demand of whatever dimension they believe appropriate. I don't pressure anybody to negotiate off the bat. I do say that there's no case of mind that doesn't begin with a million dollar demand than \$1 offer, and that you can expect that your 100 cents on the dollar position is going to be met with something completely diametrically opposite. And don't freak out when that comes.

Larry Pollack: And then we have sessions among our mediators at JAMS, and we talk about issues. And one of the subject is what's the most difficult thing that you find as a mediator. And some people say, well, it's making a mediator's proposal. Some people say it's dealing with a difficult lawyer, etc. My own view is that the hardest part of the session is breaking through the million dollar demand and the \$1 offer dynamic at the outset of the case and trying to find a way.

And as I said in our last session, every case is different. Trying to find a way to break through that inevitable opening and get to a point where the goal posts are not together, but they're closer. And so they're able for people to actually negotiate. And that is the hardest part. And it is neither art nor science. It really is a reaction in each particular case as to how that's done. I'm being curious for Adena and Joe's reactions to what they find as ways to break that initial inevitable logjam.

Adena Edwards: So in my view, when you go into a mediation, it kind of doesn't matter what the other side has demanded or offered because you come in with where you want to end up, you know where that is. So what does it matter where they are? In my view it doesn't matter. Usually if you are the defendant, the plaintiff is going to have some pie in the sky number. So let's just put that aside, not even ask for demand if they haven't made one.

You just start out with an offer of where you think we should start. Because if you wait for their demand, it also starts to set a tone in their view of, "Hey, I'm here." And then the client starts to think, "Oh, well, I'm getting somewhere near there, maybe in the middle between zero and that number." But that number doesn't mean anything. If someone's got a pie in the sky number, it really means nothing. It's a gazillion dollars, a quadrillion dollars. It might as well mean nothing. So starting out with an offer versus waiting for demands might be a better approach. And I found actually better results to get away from that logjam.

Joseph Saka: Yeah. And I'm reminded of this quote from Mary's story that came out last year and it's something that really ... he says, if we start from a place of reasonable and they start from a place of crazy, when we settle, we're going to be somewhere between reasonable and crazy. And so I think there's a lot of that dynamic where you see another side at a completely unreasonable number and you're at the same level because you don't want to come to that place of reasonable because of that dynamic.

And I think is it takes often a mediator to break that logjam. And obviously it could be brackets. I think one of the things that Larry does very effectively is he sometimes zeros in on a number or floats different types of numbers and just sees what the reaction is inside the room. And if it's no way in hell, then it kind of gives him an answer. And if it's maybe, maybe not, then that's a different reaction.

Larry Pollack: I find Lynda that experience teaches that numbers in past cases concepts settle them. And what I sometimes do is let the parties go back and forth, demand, offer, demand, offer. Because within that process, you will see perhaps someone being a little bit more flexible than the other side. And

you'll get a sense as to where the flexibility might be. And at a certain point, I might say, well, look I've looked at your argument and you might get home, you might not get home. And there's always stuff happens and maybe you could get home 70% of the time on this. And that would be a good result. And so if you applied 70% to your demand figure, maybe this is a neighborhood you might want to think about and see if it gets any traction and float the opposite in the other room and see how the ideas can synchronize to just move those goalposts.

Lynda Bennett: Yeah. I mean, one of the things that frankly we debate and we touched on this in the first episode in this series is whether to make the demand as the policyholder, and Adena touched on this, whether we make the demand before we come to the mediation, because sometimes sending that out of the world demand in the front end, ends the mediation before it starts.

The insurance company says, "I'm not wasting my time coming to this. This is what they're thinking. Forget about it." Versus in other circumstances, Larry as you said, every case is different, showing up at the mediation, and Adena having that demand in hand helps to expedite the process because we're in a neighborhood. We have a general sense that we're at least playing the same game in the same stadium. Adena may be in the nosebleed and we may be on the field, but we're at least in same stadium playing the same game.

Adena Edwards: I think it depends because if the number is too high, if it's too out of the realm of reasonableness, we come in thinking we're never settling this case. So I'm thinking I'm going to get some information today, but it's basically a waste of day as far as settlement goes. But it's only if I really think I could get the case settled and the demand is going to be somewhat reasonable. I can rely on that. It's going to be somewhat reasonable.

And by reasonable, I don't mean within the realm of settlement, but really just not high in the sky, outside of our limits, way beyond what we'd ever pay. If it could be reasonable, then I want the demand. If it's not going to be, and I have pretty confidence it's not going to be reasonable, then I specifically say, "You know what? I don't need a demand. We'll go in and we'll see if we get something settled. We'll start out with an offer."

Lynda Bennett: Yeah. I mean, I did just want to comment that your statement earlier that the insurance company would start with an offer is an incredibly outside the box, very unusual thing. I credit you for that. I think it's great. I think it would be a great way to start a lot of mediations just so we can make sure-

Adena Edwards: Not the insurance company, because my approach is a little different. Because I do think, generally speaking, if you're out of mediation, you plan to settle. There is a number that gets it done. So clearly you're there with the intent to settle. Otherwise, you wouldn't be there. So starting out with an offer sets the tone in your realm, not plaintiff coming out with a demand in their realm.

Lynda Bennett: Right. So here's another topic I want to make sure we get to today in today's discussion. And that's the topic of midpoints because, and Larry you've sort of started to touch on this with the need for there to be a little bit of a back

and forth. Joe can tell you in our room with our clients, there is a great deal of frustration and a desire for speed to just cut to the chase and get to the number. Are we going to settle or are we not?

Lynda Bennett: And in our experience, the insurance companies typically want to have a series of offers exchanged because they're working on designing what the midpoint of those numbers is to then figure out what range we're getting into. So Larry, talk about, one, whether you validate my hypothesis on that. And two, how you get both parties to stop telling you and qualifying every offer with, and don't go to the midpoint, because I'm not taking that. And I'm not settling for that.

Larry Pollack: And having done this now for as long as I have, you just assume that people are going to say, "Don't and look at the midpoints." When everybody knows that everybody looks at the midpoints and oftentimes they will put out proposals that are designed to have the other side look at the midpoints even though they're saying, don't look at the midpoints. I think that no one would need mediators if all they did was divine midpoints and come up with 50-50 solutions.

I think that it's the job of the effective mediator to place some evaluative aspect into their approach to what they're doing, because people will then believe and have faith in the process that it was looked at, even if they're on the wrong side of the so called 50-50.

And so I think that human nature is hard to change. And so when things come forward, people are going to look at the midpoints. They're going to do it as a data point, but it's probably just a data point. And I just don't think you can get around it being there, but it shouldn't, in my view, be the predominant aspect of decision making.

Lynda Bennett: And so Adena now you know why we love Larry and why he's so busy. You're so hard to get on his schedule. What's your view on midpoints and sort of how to avoid starting the process going down that road? Because I think we'll all agree it's a pretty unproductive side show.

Adena Edwards: So the way that I tend to approach things is by not looking at the other number. I just move at my own pace. And by not considering necessarily where they are as the basis for my number, then I'm not looking at the midpoint at all. I actually figure it out every time just to see where the other side might be thinking. But in my view, that's not where I'm thinking, that I will end regardless of where I want to be, whether or not they're at a different midpoint.

Lynda Bennett: All right, Joe, you alluded before to bracket. So for the sake of our listeners, explain what that is. And then talk about that. And Larry will tell us whether he loves or hates brackets.

Joseph Saka: Sure. So in my experience, when the process of exchanging offers is moving too incrementally, one side will propose brackets whereby if the other side will go to this number, then we'll go to this lower number. So it tries to

facilitate a dialogue that's moving things a little bit faster in direction of a reasonable number.

Lynda Bennett: Right. And then we're all still doing the midpoint math. Good job. But Larry, back to you. How do you feel about brackets? I know that you let the parties drive the process. But you personally, do you find the bracket approach to be effective or another side show like midpoints are?

Larry Pollack: I think every case, as I mentioned, every case is different. There are some case where a bracketed approach will move past the million dollar demand and the \$1 offer because it'll put different numbers in the frame and it clearly it has utility. I mean, there are tools in the mediator's toolbox. In some case, there are a lot of tools. In some cases you got one or two and you got to figure out when to use them. And so bracketed approach is one of them.

The other is the number of figures in the negotiation parameters. For example, if one side is stuck at a five figure number and the case will never settle for that, it may be best to say, listen, you've got to go to six figures because this case does not settle in the five figures. And the same goes for 6, 7, 8, 9 figures, wherever you are in the case. That's another form of ... it's a suggestive form. Brackets are suggestions as to where to go, but there are other ways to do it. Would you think in terms of this range? If I could get the other side here, what would you do? I mean, it's all with the aim of moving people to positions that they have yet to express.

Lynda Bennett: Yeah. I love that. The psychological barriers that have to be broken through with that coma or that excess digit.

Larry Pollack: The same Lynda, at the end of the case, there are many cases that settled for 2.9 or '95. And I had one case a few years ago where we spent the last two hours deciding whether it would settle for 2.995 million or 3.0.

Lynda Bennett: Hey, Larry, that's where you earned your money. That's where you really earned your money. All right. So Adena, I want to talk about mediator's proposal. So Larry, we've gotten down to the ling long of this, but he's gotten something of a read in the rooms and he's going to come with what's called the mediator's proposal, which is him telling you and telling me, "Hey, you know what? I think this case can settle for five million dollars. And negotiation time is over. It's a thumbs up or a thumbs down." What's your view on that? And give us a window into the world of when a mediator does that too soon so that Larry can leave with some information from today's session too.

Adena Edwards: Well, I think the parties really have to be ready and really have to be in that ... there's a judge that used to say the zone of irritation where everybody feels that it could be in there. And if that mediator's proposal's in the zone of irritation, I feel like it works and both sides are willing to accept or at least consider it. But if it's outside of that zone, then all it does is get one party really entrenched and the other one really pissed off.

Lynda Bennett: And so I'll throw it back to you, Larry. How far of a limb do you feel like you're going out on when you make that mediator's proposal? Do you have a pretty

high confidence level before you go in there? Or is that really sort of the hail Mary to try to get this thing settled at the end of the day?

Larry Pollack:

First of all, let me just say Adena that there's a colleague of mine at JAMS who has said that she invented the term zone of irritation and now I'm [inaudible 00:16:38] so that's the first thing. The second [inaudible 00:16:40] of mediator's proposals is one is the brokered mediator proposal where I go room to room and say, "Hey look, do you think," I usually start with the paying party, "do you think you can bring self to pay such and such?" "Well, what are they going to do?" I say, "I don't know what they're going to do, but I'm asking you."

And then I go to the other side and say, "Look, if you could get such and such, what would you do?" Because there's a big difference between people's approach to the bid and the ask, the offer and demand game, and the second of whether they could have real money, whether they actually have it in their pockets. And if they think they can get it, that they will think about it differently. I'm a big fan of the brokered mediator proposal, because then you're not telling people what to do.

The second is the more formal mediator's proposal where you come out with a number that you play God and you just say, "This is what I think case is worth. If you like it, let me know in a week. And if you don't, you go back to litigation." A number of judges as mediators take that approach. I usually don't. I will broker my proposal, even if it's one that I'm going to put in formal written form.

And so everybody will know what it's going to be and why before they actually get it. Because I think the parties are part of the process and they shouldn't be told what to do in a consensual setting. And I like the brokered approach. And sometimes I will just leave people with the brokered numbers and then follow up with them and say, "Hey, you had a few days to think about it. What do you think? You think you can do this?"

So look, people, if they trust the mediator, they may well gravitate towards the mediator's number. They may find as in a case where I had with Joe over the past year, that they respect what the mediator said, but they just don't think that they can go there. Remember we're looking to see if we can resolve the case, maybe not today, but maybe at another point in time. And everything is a process because north of 90% of civil cases settle anyway. And so if you establish that you're somebody to trust, people will come back to you and get your help as the case proceeds.

Lynda Bennett:

Great. And Joe, I'll just kick it over to you briefly to comment on whether our clients really believe Larry when he says this is the number as the mediator's proposal or is there room for negotiation?

Joseph Saka:

No, I mean, I think we take Larry at his word for sure. Sometimes there's other factors at play such that we need to litigate the case a little bit more before either side is ready to settle, but I think we take Larry at his word.

Larry Pollack: And to the policy holder, Lynda and Joe, if it's a brokered proposal, it will probably be the proposal that is beyond what the insurer was going to pay and is probably the best that the mediator can do, because if you don't have the ability to say that you really have trouble getting the case resolved.

Lynda Bennett: That's great. All right. So we're just about at a time. This has been tremendously helpful. You've been very generous in sharing your practical tips. Really appreciate that. But before we wrap up, I wanted to give each of the three of you an opportunity to talk about the single most important tips that you would give people going into a mediation. How are they going to make it successful? We'll start with Adena.

Adena Edwards: In my view, the best you can do is go in with an open mind. Because if you walk in the door and say, "This is where I'm going and that's it. I'm not going to budge." And you're not willing to listen to any new information, then it's going to fail.

Yeah, there's going to be times where you're successful because you're strong arming the other side into your position, but more times than not, you're not going to be able to settle because you didn't hear what the other side was saying. Very often it's just listening and understanding what the position is and giving just credence to their position and their arguments.

Sometimes people just want to hear, "Hey, you know what, we're sorry this didn't work out the way that we all wanted to. Clearly this wasn't the intent. We didn't want to be in litigation, but we want to resolve this. And we want to move forward with our business partner together." Because insured and insurer and insured our business partners, and you want to retain the business relationship. It's always the best litigation between insured and insurer when you can still move forward and still continue that relationship. You don't necessarily want to end it. So open mind, that's the number one thing that I can say.

Lynda Bennett: Great tip. Joe, you're up.

Joseph Saka: I echo a lot of Adena's statements there about being prepared to hear the weaknesses of your case and trying to really understand them. But I would say the other thing that's really important at the outset is go in with a goal as to where you want to end up. And hopefully that's a reasonable goal. Otherwise, you're not going to get there.

Lynda Bennett: All right, Larry, bring us home. What do we have to do to succeed?

Larry Pollack: I agree with both sides. That's the job of the mediator, I guess. My advice is trust the mediation process. We are here to solve your problems, not to make them worse. And if you trust the process, the mediator has the appropriate commercial intentions. And quite frankly, that's where your clients should be. They should be trying to be commercial because it's a commercial world from which their dispute emanates.

Lynda Bennett: All right. Well, that was really terrific. Again, thank you so much. This has been a wonderfully practical and actionable advice driven in our couple of

episodes with you. In the final episode of this series, just when we thought we got to yes with Adena and through Larry's help, we're going to address what happens after you leave the mediation and you don't have that settlement agreement all signed up and documented. And where did things go wrong? And what should have you done at the mediation session to prevent that from happening? So hope you join us next time for that one so we can complete the process of the getting your case successfully mediated, settled, and paid. So thanks again. See you next time on Don't Take No For An Answer.

Kevin Iredell:

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