

DEALING WITH INSURANCE COMPANY CLAIMS REPRESENTATIVES

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Over the years of working closely with liability insurance claims representatives (adjusters, if you will), I have observed a wide range of tactics employed by plaintiffs' counsel and have come to some conclusions about what works and what does not.

NICE GUYS *DON'T* FINISH LAST

Many plaintiffs' attorneys, especially when they are just starting out in practice, feel that they must establish credibility with their adversaries (the insurance claims representatives) early and that to do so, they must show them right out of the box what tough, nasty street fighters they are. Some believe that the "squeaky wheel gets the grease" and that the more obnoxious they are, the more likely it will be that claims representatives will pay them lots of money just to get rid of them. Others feel that such bluster will impress claims representatives and add value to their cases.

In my experience, such tactics do little more than (a) convince the claims representative that you are a "jackass" and (b) create a strong desire to rub your nose in whatever you are dishing out. Keep in mind that most claims reps watch the TV lawyer shows, know how to find the lawyer joke blogs on the Internet, and love to tell their own war stories about "interesting" lawyers they have met.²

COMMON INTEREST

The more successful plaintiffs' attorneys have recognized early on that, at bottom, they and their clients share the same primary goal as the insurance company and its claims representatives – that is, to resolve personal injury cases as quickly and cost effectively as possible, so as to move cases out of their file drawers to make room for new ones.

If you regularly represent plaintiffs in personal injury cases on a contingency fee, it should not come as a revelation that settling a case for \$30,000 three months after it comes in your door is far more advantageous to both you and your client than waiting a year, preparing for trial, spending a week in trial, having the jury award you the same amount (or maybe less), going through the appeal process, etc., etc. Even if you think that the jury will award your client *more* than \$30,000, it has to be an awful lot more before going the distance will be worth the extra time, effort, and risk.

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² One of my favorites, related by an out-of-town claims representative, tells of her experience with a lawyer somewhere in the Mid-Atlantic States who negotiated by getting down in her face and snarling: "Never forget that my name ends in a vowel!"

A claims representative has similar issues. The longer the file is open, the longer the company has to tie up money in loss reserves which, by law, are usually restricted to conservative investments (T-bills and the like). The longer a file remains open, the bigger the claims representative's work load becomes as new matters are added to the stack. The longer a file remains open, the more likely it is that the case will be placed in suit and start costing the company attorney's fees. From the claims representative's standpoint, the question is: "Isn't it better to pay \$30,000 now rather than have a jury make us pay after we have spent as much or more in defense costs?" Of course, there is also the risk that the jury will make the company pay much more than \$30,000.

When dealing with a new case and an insurance company representative with whom you are not familiar, it is helpful to put yourself in his or her shoes as much as you can. Learn as much as you can as quickly as you can about the constraints and protocols which are imposed by the company. To do this, you will have to spend some time getting to know the claims representative and in building a relationship of respect.³

Almost all companies require their claims representatives to get a handle on cases very soon after they are reported by their insureds. They need to decide which of a number of "bins," so to speak, to put a new case in. Should a case go in the "defend" bin or the "settle" bin? Should it go in the "routine, soft tissue" bin or the "complicated injury" bin? The claims representative needs to decide the company's exposure and whether it is likely to exceed the policy limits.

Of paramount importance is deciding the amount of money to set aside as a loss reserve. A lot of factors go into establishing a reserve, and insurance companies have many different approaches to this issue. In my experience, how a loss reserve is set and ultimately what amount is established for a given case is a closely guarded secret. As the plaintiff's attorney, do not expect to find out what this figure is. If you are lucky, somebody may let it slip when negotiations get hot and heavy toward the end of the case, but, typically, you are going to be kept in the dark. Theoretically, the amount set for the reserve should be commensurate with the settlement value of the case, taking into consideration liability issues, extent of damages, etc.; however, as I said, different companies have different approaches. Some will take an extremely conservative approach and reserve a case at maximum exposure, assuming 100% liability. Considering how much money this ties up unnecessarily, this approach is becoming increasingly rare. Other companies may deliberately (some would say, imprudently) lowball the reserve.

As a plaintiff's attorney, your first goal in most cases will be to make sure that the insurance company has as much information about the case as it is possible to give them, so that a realistic reserve will be set early.

Such early attention to the case will pay dividends in ways other than establishing a reasonable reserve. Psychologically, most claims people will pay more attention to a new matter than they will to one that has been gathering dust in a drawer for a long time. In other words, you want to do what you can to make sure that the claims representative keeps your case on the front burner until it is resolved.

FULL DISCLOSURE IS KEY

³ Hint: this is difficult to do if you are of the "my-name-ends-in-a-vowel" variety of lawyer.

There are a number of techniques you can use to accomplish this. One that I have found useful is, soon after you get a handle on the case yourself, to pretend that you are responding to a set of interrogatories propounded by the defense attorney, even if the case has not yet been put in suit. Put together a set of standard interrogatories typically used by defense counsel, or, if you don't have any, find them in a form book somewhere. Once you have obtained the medical information, the police report, etc., write a letter to the claims representative responding to all of the questions typically raised in such interrogatories. If there are some answers you cannot provide yet, say so and explain why. When I am representing the defendant, my purpose in sending out the first wave of discovery (i.e., interrogatories), is to help the company determine, as quickly as possible, which bin to put the case in. If you provide this information to the claims representative up front, it will go miles toward achieving your goal of a reasonable settlement.

Another technique is to arrange a meeting with the claims representative soon after you have gathered together the information. Invite the claims representative to your office to go through the material you have gathered. Have a package ready for him or her upon arrival. Spend some time getting to know the claims representative if you have not worked together before, or in becoming reacquainted with him or her if you have. Usually it is better to have such a meeting in your own office, rather than traveling to the insurance company's office. For one thing, claims representatives sometimes appreciate a reason to get out of their offices every once in awhile. For another, you will want to show the claims representative what an efficient, well-oiled operation you are running and what a good team you have working for you.⁴ Obviously, if the claims representative can't meet in your office for one reason or another, then you should be prepared to go to the company's office.

If you have to put the claim into suit early for whatever reason, you should arrange the same sort of meeting with the defense attorney, or (even better) the defense attorney and the claims representative.

THE DEMAND LETTER/SETTLEMENT BROCHURE

You should start writing your demand letter or settlement brochure as soon as the case comes through the door. Well written demand letters work. Keep it on your computer, making changes as time goes by. Keep a subfile with documents, photographs, etc., which will be used as exhibits. When you have the case together enough and are ready to make a demand, you will then be less likely to put off this extremely important, but difficult, task. In my experience, plaintiffs' attorneys often neglect demand letters. Let's face it, it takes a lot of work to put a good one together and human nature being what it is, busy (or lazy) lawyers rationalize that there is always something else more important on which they can spend their time. In reality, if you have done your homework and have kept in touch with the claims representative, there are few things more effective than a good demand letter with appropriate exhibits.

The demand letter should be written with a maximum of facts and a minimum of hyperbole. The best approach is to draft the letter as one professional to another. You want to give the company a preview of the trial, should you get that far. No threats; no chest thumping. Thoroughness is always more impressive than bragging.

⁴ Hint: it helps if you actually *do* have an efficient office and a good team working for you!

If you have done your work well up to that point, you will have impressed the claims representative with your grasp of the case already, and he or she is far more likely to respect your abilities.

Don't misunderstand me. Don't expect the typical claims representative to get all warm and fuzzy because he or she thinks you are a good guy! Claims representatives *are* your adversaries. They *are* trying to make sure that they save their company money, settle a case for less than they have it reserved for, make points with their superiors by bamboozling you if they can, etc., etc. But more than anything else, they respect and admire a competent adversary who is doing his or her best to serve the client. Conversely, they tend to be contemptuous of lazy lawyers who cut corners and substitute BS for hard work. Experienced claim representatives can smell a lawyer who is disorganized, who is in over his or her head, or who is just "dabbling" in personal injury work.

MAKE THE CLAIMS REPRESENTATIVE LOOK GOOD

Another useful technique is to ask yourself: "How can I make this claims representative look good to his or her superiors?" Experienced claims representatives appreciate such consideration, even when they recognize that you are using the "more-flies-with-honey-than-with-vinegar" approach. They may be (and probably *will* be) a bit cynical or suspicious, especially if you come across as insincere. Once you have worked with the claims representative for awhile, however, it should become more apparent that you are working in your client's best interest and that, all things considered, it is in the company's best interest as well.

One way to turn off a claims representative completely and make it far less likely that you are going to achieve a reasonable settlement is to play your cards too close to your vest. Insurance companies hate surprises. You have no idea how much face claims representatives⁵ lose when they get to trial and find that there is much more in the way of injuries and damages than was originally disclosed by Plaintiff's counsel. It is incredibly difficult to get reserves increased quickly when dealing with the bureaucracy in most insurance companies.

A lot of companies, shortly before trial, require that the claims representative and/or the defense counsel present the case to a panel of other people within the company hierarchy. Such a technique is often referred to as "round-abling a case." The purpose is to decide what amount of money to pay and how much authority to give to the claims representative to resolve the case in the inevitable courthouse-steps negotiations. If the case has gone through such a process, with authority having been extended based on the then available medical reports and records, and you come in with some last minute stuff that shows the specials are \$10,000 higher than the company originally thought, your chances of getting a meaningful offer at that point are not very good. Do your homework well in advance of trial or mediation so that you minimize unpleasant surprises and maximize your chances of getting the money that your client is entitled to.

Many plaintiffs' attorneys have an attitude which says: "Who cares whether my opponents lose face or are embarrassed? This is an adversarial system, after all, and it is not my job to make sure that the other side is comfortable." But that is short sighted thinking. It is not in your client's best interest for the insurance company to underestimate the value of your case at *any* time, because

⁵ And defense counsel, for that matter!

the end result is often a trial with all of its risks and expenses. If the case goes to trial, you are much more likely to lose control of the case and turn the decision over to twelve people who never heard of your client, who may have undisclosed biases against people who sue other people, and who will only be exposed to a small snapshot of the facts.

It is very difficult to stampede insurance companies and scare them into paying more money than they think they ought to. Always remember that insurance companies don't need to pay you and your client as much as you and your client need to be paid. Insurance companies work with averages. Companies have access to data from all over the country and they know they can afford to be wrong now and again. They are good at making the right value judgments most of the time. On the other hand, this is your client's one chance at getting compensated for what are often significant injuries. It is not "wussy" to be forthcoming and professional with your opponents.

TIMING OF WRIT OR COMPLAINT

One question that often arises in this kind of work is when to bring suit. Obviously, if you become involved on behalf of a client shortly before the statute of limitations runs, the decision is taken out of your hands. Normally, however, the plaintiff's attorney usually has a little more time to develop the case before needing to file suit.

It is usually better to spend some time dealing directly with the claims representative before filing suit. If you have done your homework early and have prepared the case thoroughly, there is no reason why you should not spend a significant amount of effort trying to settle directly with the insurance company representative. Sometimes, it is true, this will get you nowhere, particularly if you are working with an inexperienced claims representative or one who does not yet know you or your abilities. If that is the case, don't get upset; just file suit and start things moving in the direction of trial. Sometimes that is the best way to encourage settlement. Before you file suit, however, contact the claims representative and indicate that you are going to be doing so. Thank him or her for efforts to date and indicate your willingness to continue negotiations even though the case will be moving toward trial.

In most cases, you do not want to move too quickly to file suit, because you want the opportunity to build a relationship of respect with the claims representative, not only for this case, but for future cases as well. Also, before filing suit, you have a chance to make the representative thoroughly familiar with all aspects of the case before he or she has to have developments filtered through defense counsel. With some busy claims representatives, there is often a tendency to ignore cases for which someone else is primarily responsible. In other words, once you have filed suit, the claims representative is more likely to turn his or her attention to other cases in the file drawer, and *your* file tends to slip toward the dreaded back burner. The claims representative still controls the money, but it becomes increasingly difficult to get him or her to pay attention to your case.

AFTER SUIT IS BROUGHT

It is usually a good idea, even after you have filed suit, to continue dealing directly with the claims representative in addition to defense counsel. Of course, you will need to get defense counsel's permission before doing so.⁶ Many claims representatives prefer to deal directly with the plaintiff's attorney.

You should avoid the tendency that some have to relax once suit has been filed. If you can't get the attention of the claims representative, you should be bending your effort toward making sure that the *defense attorney* pays attention to the case. Be proactive with discovery. If you need to take the defendant's deposition or that of any other witness, don't wait. Obviously the defense attorney will want to spend a little time becoming acquainted with the case before agreeing to depositions, and there is nothing wrong with accommodating that need. Most will want to have you answer interrogatories before scheduling depositions. Since you will already have prepared the answers to a standard set of interrogatories, this should not present a problem. Answer the interrogatories soon after you receive them and keep the pressure on (politely, of course) to move discovery along. Your aim in all of this is what it always has been, and that is to reach a just resolution for your client as early as possible.

ALTERNATIVE DISPUTE RESOLUTION

Over 150 years ago, Abraham Lincoln wrote:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.⁷

As most of you know, civil cases in superior court are required to go through some form of alternative dispute resolution, usually well in advance of trial.⁸ By far, more personal injury cases are assigned to mediation than are assigned to arbitration or the now virtually obsolete "neutral evaluation." It has always been true that 85% to 90% of personal injury lawsuits are settled prior to trial; however, in the past, more often than not, these settlements took place on the "courthouse steps" after all parties had unnecessarily wasted a lot of time and incurred a lot of expenses. While it is true that some cases will always wait until the last minute before settling, many can be dealt with far more efficiently at an earlier stage if people would simply pay attention to them.

The primary advantage of mediation and the reason it has been successful in resolving cases early, is that it forces people to pay attention. All of the stakeholders have to gather together in one building and deal with the case at a time when they would otherwise not be inclined to do so.

To take maximum advantage of Rule 170 mediation (or any other kind of mediation, for that matter), it needs to be taken seriously. If you attend a scheduled mediation without doing the necessary homework, it can be a complete waste of time. If, on the other hand, you have

⁶ [N.H. R. Prof. Conduct 4.2.](#)

⁷ From *The Collected Works of Abraham Lincoln*, edited by Roy P. Basler, Volume II, "[Notes for a Law Lecture](#)" (July 1, 1850?), p. 81.

⁸ [N.H. Super. Ct. R. 170.](#)

expended the effort to make sure well in advance of mediation that all of your “ducks are in a row” and have made sure that your opponents have also paid attention to the case, your chances of resolving the matter will have increased tremendously.

Prepare for mediation as if you were preparing for trial. Make sure that your medical and other experts have been disclosed and that their reports have been sent to your opponents well in advance – whether or not the deadline for disclosure has passed.

If you attend mediation with a last minute expert disclosure handed to the claims representative and the defense attorney as you walk through the door of the courthouse, you are not likely to have a productive mediation. Unless the injuries are of the “garden variety” and you have used a respected treating physician as your expert – as opposed to hiring one of those people who advertise in the back of *Trial* – the defense attorney and the claims representative are not going to want to pay *any* significant money until they have had a chance to have an expert of their own analyze it and maybe schedule an IME. While it is true that many cases that do not settle on the day of mediation do so soon after, usually the best shot at settlement is while everyone is sitting in the same building and paying attention to the case. Once everybody is back in his or her own office, other matters inevitably intrude and the chance of settlement lessens.

CONCLUSION

Dealing with insurance representatives is not so different from dealing with most people. Hard work, coupled with courtesy and consideration, will go a long way. Success in this business depends as much on your ability to persuade an insurance company representative as it does on your ability to persuade a jury.⁹ As a trial attorney, you may pride yourself on your ability to thrive in the arena that we call the courtroom, but your client, chances are, does not share that passion. The admonition to “keep your eyes on the prize,” which has come to symbolize the civil rights movement led by Dr. Martin Luther King, ought to be the motto of trial lawyers, as well. You are hired to get money for your clients. All the rest is secondary. You persuade, cajole, and negotiate with insurance companies “because that’s where the money is.”¹⁰

⁹ Of course, if you can’t do the latter, your ability to do the former is probably pretty weak!

¹⁰ With apologies to [Willie Sutton](#), the noted desperado who, when asked by a reporter why he robbed banks, is reputed to have given that answer.