A FORMER DEFENSE LAWYER'S TEN TIPS

FOR A BETTER SETTLEMENT

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INTRODUCTION

I had just concluded my third year of practice as a "Plaintiff's attorney" when the Program Chair asked whether I would be willing to draw upon my eighteen years of experience as a defense attorney and share my thoughts on how to better settle automobile cases. Like all of you, my practice keeps me fairly busy. In my spare time, I try to lobby against all of the "tort reform" that must be passed in order to avoid the ruining of our civilization. In those precious moments of free time, I try to remember to send flowers to my wife, attend my son's little league games, and read about Prudence going to the potty to my two-year old. Accordingly, I was somewhat reluctant to take on the task of writing and presenting this paper.

Upon brief reflection, however, it dawned on me that this is not a research-based paper. I do not have to spend any time editing and proofing headnotes or footnotes, as there will be none. Finally, it would be virtually impossible for any defense lawyer to argue I breached some former client's confidence, as what I am about to write is largely based in common sense.

I wish I did have deep, dark secrets to offer that would magically transform your efforts at settlement to highly efficient and productive discussion. The truth of the matter is that a good settlement is the result of virtually any other success in life, preparation, preparation, and more preparation. What follows are my thoughts on the practices that each of us should keep in mind as we seek to effectuate a prompt and fair settlement for our clients. After all, this task should be relatively simple since the insurance claim representative shares this common goal.

The following are my best shot at the ten tips for achieving a better settlement. This list is not necessarily in the order of importance; rather, it tends to track the life of the claim process.

1.

IDENTIFY ALL POTENTIALLY RESPONSIBLE PARTIES EARLY AND SEEK PROMPT DETERMINATION OF ALL FIRST AND THIRD PARTY COVERAGE THAT MIGHT BE AVAILABLE AND THE PRIORITY OF THIS COVERAGE

We are all familiar with the metaphorical three-legged stool upon which a successful settlement must ultimately rest. Presumably, at time of intake, you have already determined that liability is probable and your client's injuries warrant prosecution. The third leg of the stool involves a complete understanding of the issue of collectibility. In most circumstances, collectibility rests with the insurance coverage afforded to your client on a first or third party basis. In most states where third party tort liability remains, there is still some form of "no-fault" that provides for insurance benefits from the client's own automobile insurer. In addition to these first party benefits, you must determine the availability of major/medical and disability insurance. In most states, the common law collateral source rules have been abrogated to allow the tortfeasor a set off to avoid double recovery. Such setoffs typically are not available where the first party insurer has a right of reimbursement of subrogation. Consequently, understanding the extent to which these insurance benefits apply and give rise to a lien against third party recovery is essential to the presentment of your claim. Moreover, governmental "super liens" under state statute and federal law need to be thoroughly analyzed in order to understand your client's obligation for repayment of any third party recovery. To the extent that relatively low insurance limits are available in a large "super lien" case, the attorney can find himself working for free and benefiting only the super lien holder. In such circumstances, even a policy limits recovery can become a nightmare.

In concert with determining the first party benefits and liens, it is important to make a thorough review of the landscape of potentially responsible parties relating to the use, maintenance, or operation of the motor vehicle at fault in the causing of the accident. Of course, the driver's policy information is readily apparent. Additionally, full investigation needs to be made of any ownership interest, owner's policy, employment relationship, leasor, joint venture, or other legal relationship that under relevant state law may give rise to vicarious liability for the active negligence of the driver tortfeasor.

Additionally, an assessment needs to be made of such issues as whether failure to properly maintain a vehicle was in any way causative in the accident event. Finally, issues of defective seatbelt systems or crashworthiness need to be analyzed. Associated insurance coverage for each of these potentially responsible parties must be assessed at the outset. Once this is determined, the likely allocation of fault and priority of applicable insurance coverage should be assessed. Obviously, most cases will involve the relatively simple scenario of an owner-driver having stated bodily injury liability limits available for recovery.

Finally, all family member insurance policies should be assessed to determine whether underinsured motorists coverage is afforded to your client. The availability of UM may impact your strategic decision of whether to make an argument of a non-automobile tortfeasor's liability.

2.

MANAGE YOUR OWN CLIENTS' EXPECTATIONS FROM THE OUTSET OF THE CLAIM PROCESS

Once you have analyzed the insurance coverage, you are now in a position to begin the most important element of the settlement process, management of your client's expectations. At the beginning of the attorney-client relationship, it is always tempting to present a very aggressive and positive view of the case. The client wants to know that she is hiring the champion of her case. The attorney wants to project confidence in her own ability and in the merits of the case. All of this chest beating must be tempered with the ultimate realities that exist in any claim. Although I have but three years in the representation of Plaintiffs, I am convinced that there is simply no perfect case. Hopefully, while you have been determining coverages, your investigator has been interviewing the witnesses to the accident and your office has been obtaining the medical records by authorization, including those inevitable prior treatment records that seem to always involve pre-existing problems with headaches, neck pain, and back pain. It is at this point that the lawyer must walk the fine line between that of the champion of the client's case and the pragmatist who knows that no matter how minor these prior

complaints and how completely these problems resolve, they will have a negative impact on the claim value.

3.

SPEND TIME GETTING TO KNOW YOUR CLIENT AND ANY UNIQUE CHARACTERISTICS THAT MIGHT HELP OR HURT THE PRESENTATION OF THE CLAIM AND SETTLEMENT PROCESS

At this point, you have probably arranged for an update conference with the client to begin discussing the results of your preliminary investigation of coverages and the development of related injuries as seen in prior and current treating physician records. It is at this juncture that I suggest you get to know your client a little bit better. Examination of some of the warts of the case is also an opportunity to identify some of the beauty marks. By understanding the unique talents, interests, activities, and motivations of the client, you will be able to personalize the settlement demands to come and present a knowledgeable, objective, and involved attorney image to the claims professional. Trust me, any claims representative will be impressed with an attorney who seems to genuinely understand the client's injuries and the impact upon her lifestyle. This will distinguish you from the claims representative's pre-conceived notions that the attorney's office is simply a mill where impersonal claims processing is largely undertaken by paralegals and all the attorney cares about is turning the case without having to work it.

4.

BEGIN OBTAINING THE BACKUP DOCUMENTATION FOR A CLAIM PRESENTATION BEFORE YOU SUBMIT A DEMAND

The "end game" for any successful claim is the successful settlement. A successful settlement is one that not only achieves the maximum amount that the carrier is willing to voluntarily pay and reflects an objective fair compromise value, but also one that is done with the least amount of aggravation and delay. Although early on in the process you have sent a letter of representation to each of the potentially involved carriers, I do not think it is wise to immediately begin taking a position of value. The

claim representative will proceed under claim guidelines to undertake at least a basic investigation of the loss and is likely to begin requesting of your office documentation supporting your claim. Again, there is no magic to what this claims representative is going to ask you for. She is going to ask you for support for the proposition of liability, causation and damages. She is going to want to see the medical bills, other insurance policies that might apply, narrative reports of the physicians, including the diagnostic codes, verification of loss wage amounts, including tax returns, social security printouts, employer wage verification statements, and financial reports for the self-employed plaintiff. Knowing that all of this is going to be asked for, I suggest the best practice is to begin gathering this information as soon as the client retains your counsel.

5.
KNOW WHAT THE ADJUSTER NEEDS TO SETTLE YOUR CLAIM

An experienced practitioner knows that the claims specialist responsible for preparing the loss adjustment reports on your case will be required to have the basic information to back up any settlement amount, as identified in tip number four above. If you have not established a dialogue with the involved carrier on other cases and established some understanding of what this carrier typically needs to settle a claim, then do not be shy to ask. Again, you know that the carrier is going to do nothing differently than you would when trying to evaluate the case. The first obligation of the claims representative is to confirm coverage. The next obligation is to investigate and make a liability determination. The next step in the process is to assess any comparative fault or other defense against the Plaintiff. The claim representative needs to understand the causally related economic losses documented to have been incurred in the past and a reasonably sound basis for those economic losses contended to occur in the future. The claims specialist will need some backdrop of information to understand the likely jury verdict value for the non-economic losses. Finally, the claim representative will apply the liability percentages to the range of probable verdict value and achieve a settlement range. Plaintiff's counsel should keep each of these elements of the loss adjustment process in mind as the background information is developed.

6.

RETAIN THE NECESSARY EXPERTS ON LIABILITY AND DAMAGES WHERE WARRANTED AND DO SO EARLY IN YOUR EVALUATION OF THE CLAIM

I am a big believer in retaining experts early and in using their guidance as I prepare the case. Obviously, many automobile cases do not involve injuries or coverage limits sufficient to warrant extensive expert retention on liability unless absolutely necessary. Most practitioners have at least a working knowledge of the basic physics involved in automobile reconstruction. Further, you typically have a relationship with an accident reconstructionist who will be glad to provide you with a basic analysis of a disputed liability case for a relatively small fee. On the damages side, making sure that your client is being referred to the proper specialists for treatment is critical. For example, an elderly Plaintiff may be receiving treatment for headaches from an internist who is merely prescribing an analgesic. With the advent of HMO and specialty referrals, utilization review issues have oftentimes chilled a PCP's desire to refer headache complaints to a neurologist. Usually, an insistence by client/patient of a neurological assessment is all the primary care physician will require to make a specialty referral. Making sure your office communicates these types of issues with your client early on is critical to having credible timely treatment by the proper specialty. Please note I am not advocating that you "doctor shop" or make sure the client gets to the doctor whose opinion you are sure it will be favorable. Rather, I am suggesting that credible referral to a board certified neurologist will enhance the ultimate presentation of the claim and will assure that you have timely treatment by the specialist you would need if the case is to be tried.

If you have a significant injury case and you anticipate a relatively large future medical or future wage loss component, I suggest that you retain a vocational-rehabilitation counselor, physiatrist, and economist to go ahead and present preliminary reports even before litigation. While any of us can present a "net cancellation" theory of future wage loss by stating "my client remains totally disabled by this accident and was earning $30,000.00 a year at the time of the crash. Assuming inflation and the discount

rate canceled each other and the remaining work life of twenty years, my client's future wage loss is $600,000.00". While all this is perhaps true, the claim representative will look very skeptically upon this "lawyer's speak". Where, however, you are presenting these reports through experts capable of testifying to these issues at trial, the claim representative is forced to respect the numbers. In my 18 years, I rarely saw claims involving large future wage losses but unsupported by experts given anywhere near the settlement value that might ultimately be warranted once experts were disclosed prior to trial. Where, however, we saw early retention of experts who were respected and well-founded in the basis of their opinions, the serious injury unit claim representative would give much more weight to such values.

7.

MAKE SURE YOUR MEDICAL DIAGNOSIS AND OPINIONS ARE CONSISTENT, FOUNDED UPON A RELIABLE PAST MEDICAL HISTORY, AND HAVE ASSOCIATED ICD CODES

Increasingly, claim representatives are being trained to recognize ICD codes, diagnoses, and inconsistencies in medical records. Further, most of the more sophisticated claim units now have either in-house medical claim trainers, or outside consultants who are called in on more complex cases. Some carriers have even utilized injury claim trainers on routine soft-tissue case types.

Obviously, the overwhelming volume of claim presentment is found in the relatively minor soft-tissue cases. Thus, even though it might seem an extravagant allocated loss adjustment expense to use a nurse to help adjust a $15,000.00 claim, carriers have found that over large numbers of cases it makes economic sense. Further, many of the carriers that use Colossus or some other form of a relational data base, to give "suggested" values will drive the input by ICD codes or diagnoses. Further, these diagnoses will be weighted based upon the medical specialty making the diagnosis. For example, a chiropractor's diagnosis of fibromyalgia is not weighted as highly as that of a board certified orthopedic surgeon.

Moreover, the claim representative will be constantly assessing causation. Even in states where aggravation of a pre-existing condition triggers compensation for the full

injury, most claim representatives will discount an aggravation case value for a host of reasons. By making sure that you discover and first deal with any inconsistencies in the medical history, any pre-existing conditions, or other weaknesses in the medical presentment of your case, you will be in a position to better discuss the impact of such matters on the settlement value. Few things get a claim representative more excited than reviewing a claimant's prior medical records and finding that "undisclosed" prior complaint. Once the claimant adjuster takes credit for having discovered this oversight, the claim risks being forever branded as untrustworthy. Unfortunately, this is equally true of the malingering claimant and the claimant who simply forgot that they had a very minor problem with their low back after raking leaves all weekend that completely resolved after bed rest and Tylenol 3.

8.

FOCUS THE CLAIM THOROUGHLY ON THOSE AREAS THAT YOU FEEL ARE YOUR STRENGTHS

If you have controlled the timing of the presentation of the "demand package", then you have had a chance to fully explore the facts that will drive the ultimate analysis of the claim value. You know the strengths and weaknesses of your client, the issues of coverage, liability, causation and damages. At this point, you have established a relationship with your client by communicating openly and honestly regarding the issues that are of concern to you and that likely will be of concern to the adjuster. Although your client may still have what you view as unrealistic expectations, there is at least a level of trust and respect that will help you once the negotiation process is under way in earnest.

Just as you would when trying the case, identify the strongest points of the claim and focus the demand on those points. Further, do not run away from the weaknesses in your claim. Address them in a careful and thoughtful way that minimizes their adverse impact on the overall valuation process. For example, rather than ignoring the fact that three years prior to the accident your client had three chiropractic visits for low back relating to yard work, hit the issue head on. Make sure all of those records are included with your demand package. If your client has continued to work, obtain the recorded statement of a

cooperative supervisor that the claimant was able to perform her task without complaints or apparent limitations prior to the at-issue automobile accident. Afterwards, however, the client has expressed occasional discomfort and did miss some time while recuperating immediately after the accident. Make sure that any final narrative medical report has addressed the prior incident of chiropractic treatment and determined that there is a substantial new injury caused by subject automobile accident. By acknowledging these weaknesses, it gives you an opportunity to reinforce the strength of your case and provide assurance to the claim representative that this is not an attempted recovery for old injury. The last thing you want to do is have a claim examiner be given any reason to refer your case to the special investigations unit.

9.

AVOID TAKING ABSOLUTE AND COMMITTED POSITIONS ON ANY OF THE ISSUES THAT RELATE TO THE CLAIM

Typically, a successful settlement is rendered more difficult by either party taking absolute or committed positions on any issue. Chapter One of *Getting to Yes, Negotiating Agreement Without Giving In*, by Roger Fisher, William Ury and Bruce Patton, admonishes negotiators to not bargain over position. For example, if the claim representative thinks there is some comparative fault upon the Plaintiff and you see it as a clear at-fault accident, do not give up due to this positional conflict. Rather, it is wiser to agree to disagree. For example, suppose the claim representative has assigned 20% fault to your client, but valued the injuries at $200,000.00. You believe the value of the injuries is $150,000.00. "Giving up" on your position of absolute liability on the tortfeasor would still mean the claim representative is willing to pay you $160,000.00. Consequently, never say to the claim representative, "until you agree that this is a 100% liability case, I do not see any reason for discussing the matter further".

10.

MAINTAIN YOUR CREDIBILITY THROUGHOUT THE CLAIM ADJUSTMENT PROCESS

In my experience, the two most critical factors that drive the proper claim settlement analysis are what kind of impression does the Plaintiff make and how skilled is Plaintiff's counsel. This is especially true in the subjective head injury and soft tissue cases. Still, in objective cases such as a fractured joint, the residual injury and pain is driven by the credibility of the claimant and her counsel. By having a thorough understanding of the good, the bad, and the ugly facts surrounding your claim and presenting your claim in a forthright way that seeks the fair value of the case notwithstanding its imperfections, you will maintain credibility with the claims department. By understanding your clients, personalizing them in your presentment of the claim, and satisfying the skepticism of the claim representative so that she is assured that these are fair claim payment dollars that should be issued, you will find yourself reaching an efficient and fair settlement for your clients.

CONCLUSION

As you can see, I have found no short cuts for the accomplishment of the fair settlement for an automobile injury client. These "simple" automobile insurance claims require diligence, a thorough understanding of the facts surrounding the loss and of the client's injuries, and a careful and thoughtful analysis of how the claim should be presented. I leave it to you and your various jurisdictions as to whether pre-suit mediations, arbitrations, in-office interviews, work best. Sometimes, carrier programs take the negotiation process beyond the practical control of claimant's counsel. Some carriers will insist on settlement on "settlement days", at pre-suit mediation, only after an interview of your client, or pre-suit IME (which should only be given with expressed written stipulation but no litigation IME will be sought) and other claims programs that may not allow for a reasonable settlement and will force the case toward litigation and trial. No matter whether the settlement is accomplished pre-suit, the obvious goal, or during litigation, following the above ten tips should help you to close the case on a fair value. By actively presenting the information that you know the claims representative needs to support a loss payment, you and your client will be the ultimate beneficiaries.[1]

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[1] Attached as an Appendix to this paper are various claims materials utilized at Allstate to help its claim representatives better understand the settlement and negotiation process. Certainly, understanding what this major carrier sees as the important elements to claim assessment and negotiation should give you tremendous insight into how to better present your claim to achieve a successful settlement. (Alright, I lied, there is this one footnote).