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Leveling the playing field: Why insurance claims adjusters are not the enemy

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Many litigators express disdain and reluctance when faced with the hard bargaining strategies of insurance carrier representatives. This article explores the underlying sources of the carriers' negotiating advantages and the strategies in settlement discussions that are most likely to level the playing field and better achieve a mutually satisfactory outcome for litigants.

Insurance adjusters have at least five strategic advantages that present barriers to the unsuspecting negotiator and improve the adjuster's relative negotiating outcomes: training, experience, institutionally developed computer databases of information, well defined limits to authority, and a comprehensive case evaluation model that is, more often than not, highly adaptive to case specific information.

Training: Being well trained in competitive negotiating tactics, an insurance adjuster typically is reluctant to negotiate meaningfully above a discounted litigation cost model, except in response to information that modifies the case specific evaluation model the carrier has developed as of the time of negotiation.

As a result, plaintiff and counsel often experience: an initial low ball anchoring process, followed by slow movement unless there is a meaningful exchange of information that puts in doubt the efficacy of the defenses proffered; tactical acknowledgement of expressions of empathy to a litigant experiencing losses without admitting financial responsibility; framing issues to create a sense of vulnerability in the mind of the opposing counsel or litigant; and a strategy of confident communications that conceals an insurance adjuster's true feelings and opinions otherwise known as a good "poker face."

Competitive tactics that invoke in counsel high conflict responses of anger, disgust and fear may often detract from productive negotiation outcomes. Statements made in anger can intensify hostilities, create new personal animosities and contribute to an environment in which there is insufficient trust to allow informed decision-making for the litigants and counsel. Fear or disgust may cause a plaintiff or counsel with scarce financial or personal resources to experience a heightened sense of relative powerlessness and of being disrespected. This may provoke plaintiff or counsel to value so highly a cessation of the litigation that he or she undervalues what could be a more favorable outcome through persevering in negotiations or even taking the case through trial.

To overcome the "training" barrier, counsel should prepare his or her client emotionally for the full negotiating process of hours or days of competitive

bargaining so that the client does not close down what is likely to be a productive negotiating opportunity. Counsel should also manage the client's expectations in real time before and during negotiations as information is presented about likely costs and benefits so that realism and not bravado or fanciful dreams are the consistent basis for counsel's discussions with the client.

Most clients have strong emotions connected with their litigation. Whether these emotions are driven by the underlying injury or by the negotiation process itself, they are integral and essential to the process of dispute resolution. Grieving over the loss of one's identity or self esteem, hurt egos, being shamed, feeling guilt or a strong sense of frustration and helplessness are real and frequent motivating causes of litigation, not merely the existence of an economic loss.

Addressing and resolving these emotional components in preparing for and during mediation is an essential part of healthy decision-making. Counsel and insurance adjusters who fail to recognize the integration of emotion and reason make their respective jobs more difficult. Moreover, this deficiency often contributes to fewer and less satisfying outcomes. Competitive tactics are overcome by recognizing each material strength and weakness of one's case and using strategically "the currency of reciprocal information exchanges." The combination of competitive and co-operative tactics will modify favorably the insurer's evolving (albeit undisclosed to opposing litigant or counsel) case evaluation. Naturally, a plaintiff is well advised to anchor at the higher limits of a reasonable offer, followed by slow moves accompanied by the type of reciprocal information exchanges that will induce a carrier to make meaningful moves later in the negotiation.

Experience: Insurance adjusters spend nearly every day of their professional lives negotiating and problem solving. Most are experienced in the Malcolm Gladwell sense of 10,000 hours of hands-on practice so that their job training results in employing competitive and collegial tactics as appropriate in a highly effective and consistent manner, including a continual internal and confidential re-assessment of risk and rewards as the negotiation proceeds.

It is difficult for a single litigant to offset this "experience" factor. The more successful strategy, when resources are available, is to build alliances with others; to recognize that specialization of counsel does serve to offset the more generalized negotiating experience of the carrier's representatives; to build credibility by acknowledging perceived weaknesses in the proper context of proffering one's strengths; and to learn effective tactics that will cause an insured to contribute to a settlement, whenever possible through financial contributions.

Computer databases: Insurance adjusters are often assisted by institutionally developed databases that analyze outcomes of similar fact patterns, thereby avoiding many of the dangers of the irrational decision-maker who acts rashly out of misplaced passion, fear or the all-too-human combination of self-serving bias,

sunk cost bias and confirmation bias - each of which causes a litigant or counsel to believe more strongly in his or her case than is justified.

Similarly, database information, as opposed to apocryphal stories on negotiating outcome and trial outcomes, is available to plaintiff's counsel. Naturally, it needs to be reviewed thoughtfully and on a case specific basis, without causing facts to be rose-colored by hopeful expectations or gray-colored by fears of the imbalance of resources or a lack of experience that may be offset with better preparation.

Limited authority: Each adjuster and counsel is constrained in their authority by preliminary roundtable discussions of the value of the case based on the information at that time, or by a specific range of authority beyond which a person not present, and with risk management authority, must provide consent. However, that said, carriers' representatives usually have the authority range to settle a case, although it is quite possible that a carrier representative may assert, as a negotiating tactic, that someone else with higher authority must be consulted. This is a fair, albeit occasionally annoying reality.

Case specific evaluation model: A carrier's evaluation is based upon its past experience with the specific category of factual and legal issues. That is just a starting point. The evaluation is then refined on an ongoing basis, which reflects the case specific factual and legal issues, and upon the perceived practical issues of availability, affordability, capacity and commitment of resources - both financial and administrative (i.e. experienced experts, sufficient litigation support) - of the opposing litigant and counsel.

As a result, a plaintiff who is not sensitive to the insurer's adapting to new information without disclosing their new evaluation, may be deceived into believing that a carrier is unwilling to offer substantial monies to settle. This is simply because the carrier has adopted hard bargaining tactics, including that unwillingness to disclose the increased case evaluation, and increasing its offers little, if at all, in the opening and middle stages of the negotiation dance, when compared to the amount of information the plaintiff may have proffered.

I solicited the views of several individuals with whom I have mediated including counsel for plaintiff and defendant, as well as insurance adjusters. The following reflects the observations of Steve Kornfeld, an experienced insurance adjuster: "As an adjuster at mediation, I consider myself to be plaintiff counsel's best friend, not his enemy, as we have the same objective, giving money to his client. Plaintiff counsel, of course, does not perceive me that way. My goal at mediation is to achieve a fair settlement for both sides, and not to necessarily settle as cheaply as possible. As you stated, plaintiff's counsel are often very reluctant to share information with adjusters. Many times I've said to plaintiff's counsel, "help me to help you". Sharing vital information is the key to getting into the insurance company's pockets. There is very little counsel can hide that will not eventually

be discovered. In fact, the less cooperative plaintiff's counsel is, the more often that signals the insurance company that that claim might require closer scrutiny.

Kornfeld continues, "Claim adjusters are not demons or dragons, but counsel need to better appreciate their role. The lawyer's job is to advocate on behalf of his clients, while the adjuster's job is to settle claims. Often, these roles are in conflict." Each insurance adjuster and insurance counsel is simply acting in their own personal and professional self-interest, just as you are for your client.

It is not in an adjuster's professional interest to make a "major error" in evaluation. When an insurance adjuster says "no" to your demand, take it as "know" instead. Then, ask yourself and your client what kind of knowledge or information is needed to strategically improve the outcome as the negotiation continues.

Identify the categories of information that may influence a caring fact finder, and expect that by the conclusion of the negotiation, the representative of the carrier with whom you have chosen to negotiate with will have evaluated that information and made a rational risk-adjusted offer or will have communicated that information to the person with the necessary authority to get an appropriate, mutually satisfactory risk-adjusted settlement amount for your client's consideration.

The real currency of negotiating with a carrier's representative is composed of three parts: strategic information exchanges; creating negotiating conditions, whenever possible, to pressure one or more defendant to contribute financially or through non-monetary commitments of high value to your client; and building alliances with third parties or even one of the defendants or one of multiple insurers in order to increase the plaintiff's bargaining power and create new opportunities to succeed.

Thorough preparation, knowledgeable use of sophisticated negotiating tactics and developing alliances prior to the start of and during your negotiation are likely to be more than sufficient to overcome the too often heard refrain that mediating with insurance carriers' representatives is a waste of time.

The author would like to express his appreciation to several insurance adjusters and plaintiffs' counsel who were kind enough to assist in providing information.

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