

JOHNSON  CONDON

*Attorneys at Law P.A.*

# Negotiation Seminar

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## **PREAMBLE**

The goal of negotiation is to reach a fair and equitable settlement. We will be giving you our thoughts on some of the main ways to achieve this goal. You should take what you already know about negotiation, add what you learn here and incorporate it into your own approach.

Negotiation is an art, not a science. You deal with widely varying facts, personalities and tactics. There is no right or wrong way to negotiate. What is wrong is to stop thinking, evaluating and assessing your position.

## **CONTRACT**

The successful negotiation of a lawsuit will result in a contract for settlement. A valid contract need not be in writing but it must have an offer (either to pay or accept payment) and an acceptance. If an offer or demand is made and not accepted, the offer or demand is no longer valid. In other words, if you tell someone you will offer them \$5,000 to settle and their response is "our demand is \$10,000," your offer is no longer valid. The demand for \$10,000 is valid. If your next offer is anything less than \$10,000, the demand is no longer valid.

Therefore, from a legal standpoint, every time there is a new offer or demand, the old offer or demand becomes invalid. This just means neither you nor the other negotiator can go back and accept an old offer or demand. However, as a practical matter, old offers and demands are rarely taken off the table.

If you make an offer, you better be sure you have that authority and, if you want to make a non-offer statement such as "I might be willing to go to \$7,000," you have to make sure that the other side knows that is not an offer but an indication of what you may be able to do or may try to do. By the same token, if a plaintiff's lawyer tells you he thinks the case is worth \$9,000 but does not officially make it a demand and you come back and tell him you will pay \$9,000, he will not be bound. The same is true if a plaintiff's attorney says something to the effect, "I will recommend \$9,000 to my client."

## **BAD FAITH**

Do not negotiate in bad faith. You may not make offers based on policy limits. Instead, make offers based on the value of the case. With the relatively low limits written, you will have to keep bad faith in the back of your mind.

The classic bad faith scenario was in Short v. Dairyland Ins. Co., 334 N.W.2d 384 (Minn. 1983), where the adjuster offered less than the policy limits in a death case that was worth well over the policy limits. In Short, the adjuster offered \$24,000 to settle the case and stated that if the case went into suit the no-fault insurer would pursue its subrogation claim and plaintiff would not

recover the entire \$25,000. This was a negotiation based on policy limits and was found to be bad faith.

In the event you receive a settlement letter with time limitations, attached is a sample response.

### **SETTLEMENT OFFERS IN CASES OF NO LIABILITY**

You do not have to make an offer if you have a reasonable belief there is no liability on the part of the insured. If you do make an offer, make sure you document why it was made. This documentation should go to the plaintiff's attorney and explain the offer as one that has nothing to do with liability but is based on something other than liability such as cost of defense.

### **KNOWLEDGE**

Knowledge is **POWER**. You must know everything about the case to have the power to negotiate. The specific facts of the accident will help you discuss liability. The percentage of fault on the plaintiff will allow you to reduce the gross value of the claim to a fair value.

You must know the strengths and weaknesses of not only your case, but their case. If you look at the case from the other side's perspective, you will be able to evaluate their strengths and weaknesses and have a much better idea of their responses to your offers and statements. If you know the weaknesses of your case, you will be able to respond to them when brought up by the other side.

### **GOOD RELATIONS EQUAL GOOD SETTLEMENTS**

It is important to develop a rapport with the plaintiff and/or plaintiff's attorney. In particular, you will undoubtedly deal with many plaintiff's attorneys on multiple occasions throughout your career. In turn, you will need to establish rapport with him or her which will allow you to effectively reach equitable settlements. The old cliché that you will catch more flies with honey than vinegar rings true in negotiating claims. Unfortunately, some plaintiffs or plaintiff's attorneys do not understand this cliché.

Your approach should always be to not get angry or personal and do not use inflammatory words or phrases. The reaction to anger and personal attacks or inflammatory statements is always negative and puts up huge roadblocks to achieving a settlement. They only get in the way of negotiations and do not move them forward. You should remember plaintiffs and plaintiff's attorneys are only doing their job.

If you need to move the negotiations away from a personal level, you can use your boss or supervisor so the disagreement with the plaintiff or plaintiff's attorney is blamed on your boss or supervisor. This will help maintain the relationship needed to obtain a settlement.

## **WHAT EVERYONE KNOWS (NOT THAT YOU OR THEY CARE)**

### **What You Know**

- It's good for the plaintiff and the plaintiff's attorney to settle early.
- Costs and time involved as the case goes on for the plaintiff.
- Chiropractors or certain doctors will give a permanency and will take a discount.
- Every plaintiff thinks their case is worth many times more than either you or the plaintiff's attorney.
- Plaintiffs are emotionally involved and invested in their injuries and case (you don't care but it does affect the negotiations).
- Plaintiff's attorney knows or should know the good and bad parts of his case.
- Range of value.
- Does this particular attorney like to try or settle cases?

### **What They Know**

- Do you or the Company like to try or settle cases?
- You are busy and it's good for you to settle early.
- That the independent medical examination most likely will come back with no permanency.
- Aggravated liability increases the value of a case.
- Range of value.
- That you have a cost of defense. Answer: Matt Johnson has kids who need to go to college and Mark Condon has to pay off his kids' college. The policyholder has already paid for the cost of defense when they paid the premium.

## **LET'S NEGOTIATE**

You now know everything that needs to be known about this case, you have a range of values and authority. Take it upon yourself to get negotiations moving. Even though it is to the plaintiff and plaintiff's attorney's benefit to negotiate an early settlement, we can't wait for them.

Before making any contact, responding to demands or making an offer, you should list, or chart, how you believe the negotiation will go. What will your opening offer be or what is the plaintiff's demand. Estimate and evaluate what you expect each response to be, along with your reply to that response until the case is either settled or at an impasse. This is an excellent exercise to appreciate the other side of the negotiation and anticipate where they are coming from so that you can prepare to respond to anything that comes along. You should also keep the projections in mind as the negotiations go forward and make whatever adjustments are necessary. This keeps you thinking numerous steps ahead which will give you a tremendous advantage to most plaintiff's lawyers or plaintiffs who are only dealing with and responding to one offer and demand at a time.

You should not become locked into your analysis but continually re-evaluate it so your thinking stays ahead of everyone else. As you perform this exercise and perfect it, you will be amazed at how accurate you become in anticipating responses. Then you are truly ahead of the game.

This is one reason we always advise trying to understand the other side's position. You may not care about their position and it may not affect your evaluation but the more you know the more you are able to "satisfy" them and their position and "give" them what they want. You will have also put them in the position of wanting only what you are willing to "give." You don't care what they want but you do want them to want something you are able to give them.

We also strongly advocate making notes and comments as it relates to each offer and demand. You want the plaintiff's attorney or plaintiff to "hear" what your offer means. If you think a \$3,000 offer will be ultimately interpreted as a desire to settle the case for \$9,000 and you have no intention of doing so, you had better make sure you tell the other side that. You do not want to give them false hope or expectations regarding the ultimate settlement number. You should also listen to and evaluate more than just the number given to you by the plaintiff's attorney or plaintiff. What does that number mean? How do you respond to it? If the initial demand in a soft tissue case is \$50,000 and you respond with an offer of several thousand dollars, you should make sure the plaintiff's attorney understands that both of you know the range of values in this case and that it's not anywhere near where he is. Suggest he may want to get realistic or the negotiation process will take a long time.

Making front-loaded initial offers requires strong emphasis that it is not a beginning offer but is more likely a middle or end offer and that nobody should get too excited about where they are starting because you are not going much further. You need to control the expectations and educate the other side about what your offers mean. Do not let them make assumptions about your offers. You tell them what they mean.

If you are unsure of what a plaintiff's demand means, don't hesitate to ask him. As in the previous example, if a demand of \$50,000 is made in a soft tissue case, you may want to ask them if they are truly serious about that demand or a settlement in that range, that it absolutely will not happen. You can also tell them you both know the range of value of the case which is well below their demand.

You should also learn to make an offer without making an offer and solicit a demand without getting a demand. Often, people are so afraid to move they get paralyzed. If the plaintiff is at \$50,000 and he has to get under \$10,000 to have a chance of getting the case settled, you may say to him "we have round-tabled and evaluated this case and we don't see its value as being near \$10,000." If he will come to that range, you can continue to talk. What you've just done is made a \$10,000 demand for him and told him you're not going to pay it. (Now you're directing the orchestra and not playing in it.)

You can also put out numbers that are not offers by saying things like “if you get to \$10,000 we can probably or possibly get my boss to authorize \$7,500 and that’s the number you should take.” However, you should never make such a statement unless you can get \$7,500.

As you are planning your negotiation strategy, always be aware that when the difference between the offer and demand is relatively small, say \$5,000 and \$6,000 or \$8,000 or \$10,000, the logical solution and suggestion will be to split the difference. Always try to put yourself in a position where splitting the difference will be favorable to you and not cause you to have to go back and get additional authority.

Don’t be afraid to make an unusual offer. Instead of offering \$2,500, try offering \$2,535.50. It adds humor to the process and may confuse the other side.

You may also want to hold back what we call psychological money. That is a relatively small sum that you can give up at the end of the negotiation to make the other side feel like they have “won.”

### **ROADBLOCKS TO SETTLEMENT**

The following are a number of common roadblocks when resolving cases. We hear them all the time and we will explain to you why we feel they have no validity.

- *I won’t make an offer until you make a demand.* You have followed all the steps discussed above so you know the case inside and out, its range of values and how the negotiations will proceed. You don’t need a plaintiff’s lawyer to start the negotiations. You know the lawyer isn’t going to make a demand you’d pay so who cares where they are. It is an opportunity for you to take the initiative and begin setting the parameters for the range of settlement discussions. You don’t care what his demand is because you know what the settlement range is and you are either going to end up in that range or not settle the case.
- *I won’t bid against myself.* Why not? As discussed above, you are the one with the information, expertise and control. If the case settles within your range, it won’t make any difference if the plaintiff responded to any of your offers. What this statement really means is that we are not close enough in our numbers to interest me in going further. By way of example, if you evaluated the case as being worth \$10,000 and the last demand was \$7,500 and your last offer was \$5,000, you would certainly bid against yourself because you want the negotiations to continue.
- *One side has moved much more than the other.* This usually comes from the plaintiff’s attorney and can easily be responded to by telling the plaintiff’s attorney that you could only start at \$0 (which you did not do) and that he was way out of the reasonable range for value of the case so he should have moved more.

- *I have client control problems.* First, consider this may have no more validity than you telling the plaintiff's attorney you have to talk to your boss or supervisor. However, you should also consider that it may be true. In this very competitive environment for plaintiff's attorneys, it is difficult for them to give their clients the cold hard reality of whiplash cases for fear the client will sign with someone else. It is also difficult to be their lawyer and spending a lot of your time and energy telling your client why they have a bad case. Remember, in many instances, plaintiff's attorneys are your allies because they also know the realistic range of values of cases better than their clients. While there really isn't much you can do about a lawyer's client control problem, we believe you should respond by asking the plaintiff's lawyer what you can do to help him with his client (other than paying them all the money they want). If he is correct, the case may need to go to mediation where someone else can give his client the bad news.
- *I am (or my client is) insulted by your offer.* The negotiations regarding money should never be insulting. You may not agree with their demand or they might not agree with your offer but no one should be insulted by an offer of money.
- *Unpaid medical expenses, liens and subrogation claims.* Having evaluated the other side of this case, you understand that it will be difficult, if not impossible, to settle a case unless some money gets into the plaintiff's pocket. (You may not care whether any money gets into the plaintiff's pocket, but it is important to understand this is a practical aspect of settlement.) Plaintiffs are being represented on a contingent fee. They pay no fee until they recover. If they have no benefit, i.e., no money in their pocket, they have no incentive to settle. You want to give them incentive to settle.
- *What other sources are available to pay these expenses?* If no-fault or med pay is available, make sure they have been submitted. If there has been a denial of no-fault, it is the plaintiff's attorney's duty to move that forward to suit or arbitration.
- *If it truly is an impasse, it is time to be proactive.* Confirm with the plaintiff's attorney or plaintiff it is okay for you to contact the provider and attempt to negotiate a compromise resolution of the bills, liens or subrogation claims. This is often difficult for plaintiff's attorneys to do because they may have an ongoing relationship of referrals back and forth with the doctor. They may have signed an agreement guaranteeing payment of these bills out of the settlement (a major conflict of interest). It is difficult for a lawyer to negotiate with a medical provider because he has to talk to that provider about the faults, problems and difficulties with their client's case.

## BAD FAITH DEMAND LETTER RESPONSE

Dear Plaintiff's Counsel:

I received your demand letter dated \_\_\_\_\_ on \_\_\_\_\_. In it, you give us until \_\_\_\_\_ to respond to your policy limit demand or it will be withdrawn. Unfortunately, we will not be able to respond to that letter because:

*Examples:*

1. This was our first notice of loss.
2. We need the following specific things before our factual investigation is complete.
3. We need the following specific things before our damage evaluation is complete.

*Note:* If any of these things are in the possession of the Plaintiff's Attorney, include a request for them in this letter telling him/her the sooner they respond the sooner you will be able to respond to their demand.

*Note:* Now you have to determine how much time you need.

Assuming no unusual delays, I anticipate being able to respond to your letter by \_\_\_\_\_. I assume you will grant me the opportunity to obtain the information necessary to make a complete evaluation of this case.

Yours truly,

*Note:* If you determine there is no liability on the insured but still intend to make an offer, you may do it in response to the demand letter if you have all the information or at a later date when you obtain all the information. To the extent an offer is made on a case you have determined to be one of no liability, the offer should be in writing and should specify the reason for the offer. In other words, if you believe there is no liability but you are willing to make an offer to save costs of defense, put that in the letter, otherwise, that offer may be interpreted to be contrary to your determination of no liability. In other words, even in cases of no liability, there are possible economic reasons to make an offer. Make sure no one is confused about why you are making an offer in a potential bad faith case.