



Traveling the Road of Adjuster Negotiations...

Don't lose your cool to win a case



Gregory Zeuthen

By Gregory Zeuthen
OTLA Guardian

Negotiation. We negotiate for things every day. Literally every human interaction involves give and take, even if on a subtle level. Infants negotiate for food by crying, children negotiate at the playground, students negotiate with teachers over homework, and spouses negotiate with each other over mundane things — from chores to child rearing to financial goals and retirement aspirations.

Lawyers are professional negotiators for clients. We routinely negotiate with adjusters, opposing counsel, medical providers and even our clients. By doing so, we act not only on behalf of our clients but also on behalf of our profession. From over 25 years of experience and sharing ideas with colleagues, I have

developed some thoughts on how best to deal with insurance adjusters. Those thoughts include negotiation strategies and some conflicts inherent in the Rules of Professional Conduct.

When I started practicing in the 1980s, most of my clients were injured in automobile crashes. Most of the insurance adjusters were from one of the “Big Three” auto carriers — Allstate, State Farm and Farmers. Although there was a smattering of lesser-grade companies such as Viking, Dairyland, Progressive, and Colonial Penn, most of my interactions were with adjusters who worked in a large office with one or two layers of management in the same office as the adjuster. Generally speaking, I found the adjusters congenial. In the rare circumstance where a problem developed, usually a simple telephone call to a supervisor would resolve the differences.

These days, many adjusters work from home and report to a manager in another office. Regrettably, these adjusters work in isolation and have fewer opportunities to discuss claims with other co-workers. Moreover, many of these “front-line” adjusters have limited authority and very little experience, which seems to cause a high amount of turnover. With many adjusters working in isolation, OTLA member Christopher Hill suggests the high turnover of adjusters results in many who are not familiar with the

claims process. This sentiment is also shared by OTLA member Rob Kline, who notes that while there are inexperienced adjusters, many times their hands are tied by computer evaluations. Moreover, adjusters are rated on how closely they settle their cases to the computer evaluation.

In sum, there has been a change in the way insurance companies handle claims. Adjusters are not given as much leeway, are held to rigid standards, have generally less experience about the claims process and frequently work in isolation. Certainly, there are some companies that continue to use a variation of the claims model that existed in the 1980s. Notably, State Farm Insurance has a centralized office in Tigard where many adjusters now work, and there are multiple layers of management in-house.¹

Looking ahead

The underlying point is that it is highly beneficial to know with whom you are negotiating. Are you dealing with a front-line adjuster with limited authority and experience? Or does the adjuster have significant experience in dealing with claims? What is the settlement authority of the adjuster? If the value of your case is clearly higher than the adjuster’s authority, you may need to file your case, as Chris Hill points out, “to get a new decision maker.”

On the other hand, some adjusters have higher authority simply because their particular unit is geared to handling larger claims. In a past life, OTLA member Richard Rizk was in-house legal counsel to Wausau (Nationwide) Insurance Company. Rizk points out that oftentimes the type of offer you get depends on where the insurance company is located. Generally speaking, he notes that lower amounts are offered locally in Oregon. Conversely, larger companies with national offices usually make better offers. Clearly, there is a distinction between offers made in auto cases versus commercial cases. Generally, commercial liability policies will offer more money. Rizk says major commercial carriers with centralized, large loss units handle claims much differently than local automobile carriers. These units are specialized and are used to dealing with larger dollar amounts. If you know your negotiating adversary, you will be in a better position to know how to negotiate with that adjuster.

When I was a new lawyer, I spent an extraordinary amount of time writing very detailed demand letters on behalf of my clients. These tomes frequently were longer than 10 pages on even the most mundane auto accident case. I took pride in documenting every injury and every impact the injuries had on my client's life. Because many of these cases did not settle, I filed nearly all of my cases. When I got to one of my first personal injury depositions, I was chastised by an older member of the defense bar for spending so much time and effort in preparing a written demand that would "never be read by the insurance adjuster." At the time, I knew he was wrong: I was writing the detailed demand letter for the benefit of my client. Little did I realize, though, I was only partially correct.

Writing a demand letter helps a lawyer concentrate on the case by getting liability and damages into sharp focus for negotiation. It also helps in evaluating the case. As Rob Kline notes, he always

writes a demand letter because it helps him review the issues of the case, making it easier to negotiate. Kline has a good understanding of the facts and context of the case, which helps during the negotiation process and, if necessary, the written demand will be a guide to prepare the client for deposition and trial.

Knowing the goal

Simply put, a negotiation is a discussion aimed at reaching an agreement. When negotiating, it is best to know what your goal or end point will be. As simplistic as that sounds, this knowledge helps decide which negotiation tool should be used to achieve that goal. As Chris Hill points out, his goal is to obtain the best result he can within the "hassle and risk tolerance" of each individual client. Some clients need to be protected from themselves, which means they should never be deposed. On the other hand, as we gain more experience and we successfully screen our cases, we will of-

ten obtain better results after our cases are filed in court. As OTLA member Beth Creighton points out, she always sees more success for her client when she files a case.

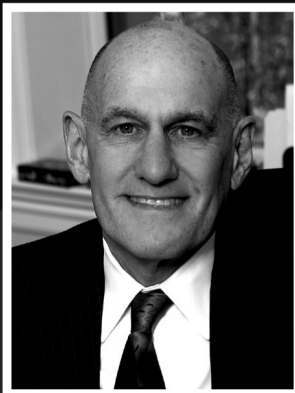
Invariably, when I file automobile cases, a new adjuster is assigned to the case. These adjusters are referred to as "litigation adjusters" or "attorney adjusters" and they have more settlement authority. Oftentimes these new "decision makers" have the motivation and experience to get the case resolved.

Once you determine what your goal is during the negotiation process, most lawyers either consciously or subconsciously engage in one or more of the following negotiation styles:

1. Aggressive — I win, you lose.
2. Cooperative — I win, you win.
3. Avoiding — I lose, you lose.
4. Compromise — I win some, you win some; I lose some, you lose some.
5. Accommodating — You win, I lose.

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Deciding which of these styles should be used depends on the goal of the negotiating process. Since some clients should not be deposed, you may need to resort to the accommodating or compromise style of negotiation. On the other hand, stronger cases may warrant a more aggressive style of negotiation.

When negotiating with adjusters who have limited authority or who simply do not see the facts as I do, I have found that it is best not to argue or get upset. It is perfectly permissible to be agreeable while disagreeing. Frankly, if the offer is low and your case is strong, anger and an antagonistic attitude will not necessarily advance your client's case and may impede a reasonable resolution of the case in the future.

Richard Rizk reminds us that adjusters "are people too." As attorneys, we are taught to be aggressive (negotiating style No. 1, above), but that does not necessarily lead to a successful negotiation posture. Once lines have been set and positions entrenched it is hard for anyone, whether it be an adjuster or an attorney, to admit that he or she is wrong. It is best to give the adjuster an out to save face.

Staying between the lines

At the intersection of our duties to provide competent representation to our clients, the obligation to keep information confidential and our duty to be truthful are the Rules of Professional Conduct.²

Lying, deceit and misdirection are not viable options in negotiation. Not only do such tactics harm your reputation — and we are a small legal community in Oregon — it also hurts the profession. The negotiation process of any single case is much bigger than that case — it involves your reputation, your firm's reputation, and the reputation of the plaintiffs' bar in general. The Rules of Professional Conduct are a floor, not a ceiling.

The exceptions do not include everything and as an advocate working within the Rules of Professional Conduct, we should not take advantage of every exception. Half or partial truths, even if permissible under the Rules, will hurt your credibility and reputation and will hamper your future negotiations with that party.³

Above all, lawyers are professionals and should be held to a higher standard. In the course of negotiations, we need to be candid and truthful, while balancing those responsibilities with the obligation to competently represent our clients and protect their confidences. Sometimes this is a fine line to walk, but to paraphrase Warren Buffett, do not trade your reputation for money when negotiating your cases.

Enjoy the ride

Negotiation is one of the many tools we use to protect our clients' rights and obtain fair compensation for the wrongs they have suffered. How we negotiate reflects upon us individually, as lawyers, and collectively, as a profession. It is difficult enough in this political climate to obtain fair results for our clients. That being said, as members of the plaintiff's bar we should be completely ethical and honest when negotiating, even if such concepts are lost on our adversaries.

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¹ However, this is a change from the 1980s when there were no fewer than five State Farm claims offices in the Portland metropolitan area.

² See RPC, Rules 1.1, 1.2(a), 1.2(c), 1.6, 2.1, 3.3, 4.1, and 8.4.

³ Rebecca Hollander-Blumoff, Assoc. Professor of Law, Wash. Univ., AALS Presentation, The Challenges of Teaching Negotiation Ethics: Rules and Reality (January 8, 2010).