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WHY DO PEOPLE NOT NEGOTIATE IN ADVANCE OF MEDIATION

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As I embark on my 8th year of mediating personal injury and insurance claims [after devoting some 25 years of practice in the area, working primarily for insurers but frequently for claimants] [I will use this term to include both claimants in litigation and claimants in arbitration with insurers], I have observed that settlement discussions in advance of mediation occur all too infrequently. This phenomenon is inimical to the way I was trained and the way I practiced law as counsel. I have spoken with counsel for claimants, insurers [I will use this term to include self-insured entities or businesses with large deductibles or self-insured retentions] and representatives from insurance companies. I have concluded that the problem is multi-factorial and, just like most things in life and in a lawsuit, depends on one's perspective.

The notion of perspective reminds me of a scene from Woody Allen's movie, "Annie Hall". Woody Allen and Diane Keaton are involved in a relationship. They are also both involved in psychotherapy. Using a split screen format, each of the characters is discussing the frequency of their sexual relations with their respective therapist. Woody Allen complains that they never have sex; Diane Keaton bemoans the fact that they are always having sex. The two characters exclaim, almost simultaneously, "Twice a week".

The factors which I believe contribute to the inability of those involved in claims and actions to conduct meaningful and productive settlement negotiations in advance of mediation are as follows:

1. Inability to realistically value the claim

Counsel for the claimant secures a battery of reports which inflate the potential value of the claim beyond anything which is realistic by way of settlement. If they present a demand to an insurer, before defence counsel are involved, they may be met with deafening silence or an offer which is so small that they believe further settlement discussions are pointless.

Conversely, insurance representatives may make a settlement offer which is unrealistically low. This may be an attempt to "steal" the claim. It may be a function of limited authority on the part of the insurance representative. It may be due to the insurer's structure which requires more in the way of documentary production or by reason of the insurer's decision making process (such that the insurance representative is required to put the claim to his or her superiors or to a committee for realistic authority). In the latter case, it may be easier for the insurance representative to secure meaningful authority in advance of a settlement event (such as a mediation or pre-trial conference).

For defence counsel, there is an equal and opposite temptation to "fall in love" with their case. Credibility issues may be developed through documentary or oral discovery. Defence counsel may put more stock in those issues than may be reasonable or realistic. Similarly, defence counsel may be overly impressed by the defence medical reports which are obtained or the result of surveillance.

2. Experience

We were all young once. Young lawyers are frequently dispatched to conduct examinations for discovery. Once again, the reasons for this phenomenon are many. Counsel for claimants may view examinations for discovery of their client as a "hand-holding" exercise and assign the task to more junior counsel. From the defence perspective, economic pressures or constraints or business relationships with insurers may mandate that less experienced lawyers attend on examinations for discovery in all but the most serious cases. The net result is that counsel who do not have carriage of the matter are not inclined (or, perhaps, not allowed) to engage in settlement negotiations at discovery. To the extent that negotiations might occur, they are hampered by the lack of experience (and resultant lack of confidence) on the part of less experienced counsel.

3. Expectation Management

If there are to be meaningful settlement negotiations conducted in advance of mediation, counsel for the parties have to manage their respective client's expectations on their own. This is a challenging task which requires finesse and tact. Mediation frequently is used by one side or the other or both to manage expectations. This is accomplished using the brief of the other side to demonstrate potential weaknesses in one's case. This is enhanced by the opening statement made in the plenary session of the mediation and reinforced by the mediator in caucus.

From the claimant perspective, counsel may be faced with questions from their client such as "whose side are you on?" or "I don't understand why we are giving up so much and the insurer appears to be offering so little".

From the defence perspective, counsel has to perform a balancing act between appearing as the fearless advocate while, at the same time, dispensing sensible, practical and pragmatic advice. This challenge becomes more complicated when some insurers have different views on different aspects of claims. Some insurers have taken a very aggressive, black and white approach to the "threshold" in personal injury claims arising from motor vehicle accidents. Counsel defending such claims for such insurers may be loathe to depart from the "party line". Each insurer has a personality (more of a risk taker as compared to more risk averse). There are further personality differences as amongst the various claims personnel working at an insurer. These factors make it more difficult for defence counsel to realistically manage the expectations of their clients.

4. Insurer Considerations

As discussed above, some insurers have very specific and hard and fast limitations applicable to resolving certain kinds of claims. All insurers have processes in place whereby claims are evaluated and authority is granted. The claims person may not be prepared to put his or her claim before the various levels of management in order to secure settlement authority which the claims person believes is appropriate to resolve the claim (which amount may be the same as or differ from the views of their counsel). In addition, it may be easier, from a process perspective, to secure settlement authority in advance of mediation rather than at the relatively early stages of the claim (before defence counsel are appointed or before, at or immediately following examinations for discovery).

5. Relationships

The personal injury and insurance bar continues to grow. Frequently, counsel involved in a matter have not had prior cases together and have no relationship. However, there are ways to get past this problem. Ask your colleagues within your firm or company or those at other firms or make inquiries through OTLA or CDL regarding the lawyer on the other side of the case. Is the person with whom you are dealing a problem solver, problem perpetuator or someone who exacerbates a problem? Is this a person inclined to settle a matter at a relatively early stage of the litigation or are they inclined to wait for traditional settlement events (mediation or a pre-trial conference)?

6. Trust

This problem certainly presents itself where there is no prior relationship between counsel. However, there are certainly lawyers and claims people who may be known to you as trustworthy, fair and reliable when it comes to settlement discussions; there are others who are not known to have these attributes. If you want to be able to negotiate effectively and successfully, you need to develop and nurture your reputation. While you will have hundreds or thousands of matters over the course of your career, you have but one reputation which will stay with you over the course of your career as a lawyer or claims person.

7. Lines are created for future negotiations

There is no question that settlement discussions conducted in advance of the mediation create an expectation, right or wrong, that if those discussions do not result in a settlement, the demands, offers or proposals that have been exchanged should form the opening positions at mediation. While I will address this in greater detail later in this paper, suffice it to say that this is a real concern. Consequently, early settlement discussions should be approached with caution and care. Rarely, if ever, should one's opening demand or offer at mediation be greater than or less than the demand or offer that was last made in advance of the mediation.

SOLUTIONS

1. Counsel and insurance representatives must strive to obtain a realistic view of their case or claim. This requires a consideration of both the strengths and the weaknesses of the matter. Efforts must be made to avoid the temptation to "fall in love" with one's position or any particular aspect of the matter. Avoid the temptation to build the claim to a size beyond its realistic and recognizable value. Conversely, avoid the temptation, from the defence or insurer perspective, to assume that a particular piece of evidence or a report from an expert has destroyed the value of the claim. Trials have the potential to produce significant wins or losses with potentially large swing values; rarely does a case settle at the extreme high or low.

2. Manage your expectations and those of your client early and often. As counsel, there is no place for cheerleaders. Rather, your role is to give thorough, sober and thoughtful advice.

3. Develop and build upon relationships and engender trust. This applies to counsel for claimants in relation to their own clients, defence counsel and insurers; to defence counsel vis a vis counsel for claimants and their insurance clients; to insurance representatives by way of their relationships and dealings with their own defence counsel and with counsel for claimants. I am not suggesting that if counsel on the opposite sides of a file have friendly, amicable relations, differences will not exist in a particular matter. However, if you have a solid base for a relationship, it will allow for the case to proceed more smoothly. Reasonable minds are entitled to disagree in a reasonable fashion. Every effort should be made to create sufficient separation and distance between the positions of the parties and the role of counsel.

4. Study your opponent. All of us have traits and tendencies. One need only look to professional sports as an example. In baseball, hitters have tendencies at the plate and they have tendencies when they put the ball in play. Is counsel on the other side of the case someone who tends to be proactive in relation to resolving disputes or do they tend to perpetuate or exacerbate the dispute? Is the insurer known for early resolution or for settlement late in the day at mediation or on the eve of trial? Even with an insurer (which regulates, to a certain degree, the behaviour of their claims staff), there are claims people who are more inclined to early resolution and those who are not.

5. Make settlement demands and settlement offers as early as practicable. In a perfect world, settlement demands and offers will not be exchanged unless and until every scrap of relevant and pseudo-relevant paper has been produced, received, reviewed, scrutinized and considered. The same is true of questions on examinations for discovery and the completion of medical assessments and the procurement of reports from experts.

The world is not perfect. Consequently, an early settlement demand will set the stage for the claim going forward. It may have some benefit in relation to reserves and, ultimately, settlement authority. It will assist in informing defence counsel and the insurer as to the theory of your claim and its magnitude. It may trigger a response [which will, in and of itself, give you a sense of how the defence sees the claim]; it may lead to further exchange of demands and offers.

Similarly, an early settlement offer from the defence will send a message as to how the defence sees the claim. It may trigger a responding demand. At minimum, it should require counsel for the claimant to present and explain the offer to the claimant and explain the cost consequences associated with an offer if made pursuant to Rule 49 of the Rules of Civil Procedure.

6. Always "leave some meat on the bone". It is very dangerous to deliver a settlement demand or offer at your "bottom line". This is true even if the lawyers for the parties are in general agreement as to the amount of money necessary and appropriate to settle the claim [as the clients may not share the same view]. If the opening demand or offer is exploratory in nature, it should be akin to an opening demand or offer at mediation [generally speaking, quite high or quite low and tantamount to one side or the other "ringing the bell"]. If meaningful settlement discussions have been conducted between counsel for the claimant, on the one hand, and counsel for the defendant or the insurance representative, on the other hand, then the demand or offer should be relatively close to the "bottom line" [so as to allow for fine tuning to the extent that one side or the other cannot secure the instructions their expected].

7. Try to attend examinations for discovery if you have carriage of the matter. You will gain a better understanding of the claim you are advancing or defending. You will obtain a better sense of not only the evidence but the manner in which the evidence is given. You can evaluate the quality and character of the witnesses. You can and should have an opportunity to feel out the other side as to whether there is any appetite for early settlement discussions.

8. Find and utilize the services of a mentor. This can be a colleague within your office, lawyers on your side of the fence e.g. lawyers for claimants speaking with lawyers at other offices for claimants or lawyers for claimants speaking with lawyers for defendants at offices other than counsel for the defendant involved in the claim. This could be through professional organizations such as OTLA, CDL, OBA or The Advocates' Society.

9. Pick up and use the phone and talk to the person with whom you hope to negotiate. Letters and e-mail are two-dimensional. They lack tone and context. It is more difficult to intimate your true settlement position in correspondence if you are on the "send" side of the equation. It is more difficult to infer the true settlement position if you are on the "receive" side of the equation. Moreover, one never knows where a live conversation will take you. You are bound to pick up some information or some sense of the direction of the claim. Likewise, you are better able to gain some insight into the personality [whether that relates to the business at hand or the person's qualities and

characteristics generally] of the person with whom you will be negotiating, either at that time or down the road.

CONCLUSION

Settlement negotiations conducted in advance of mediation are challenging but can and should be attempted (even if only on an exploratory basis). I believe that efforts continue to be made by claims personnel and by lawyers, young and old, to attempt to resolve claims in advance of mediation. That said, a number of factors must all come together to allow for those negotiations to produce a settlement.

The challenge is akin to a slot machine with multiple tumblers. Unless and until all tumblers line up with the same symbol, settlement is unlikely to occur. These factors include:

1. Counsel for the claimant must have a clear and realistic sense of the fair settlement value of their claim.

2. Counsel for the claimant must have the confidence of their client.

3. Counsel for the claimant must be able to manage the expectations of their client and explain not only the strengths of their claim but the weaknesses and the risks, and associated costs, of proceeding with litigation.

4. Counsel for the insurer must have a clear and realistic sense of the fair settlement value of their claim.

5. Counsel for the insurer must have the confidence of their client.

6. Counsel for the insurer must be able to both understand and manage the expectations of the insurer and, furthermore, an understanding of the insurer's approach to the defence and resolution of claims, the structure of decision-making and the process whereby authority is conferred.

7. The claims representative must have a clear and realistic view of the fair settlement value of the claim.

8. The claims representative must be prepared to do that which is necessary to secure the authority appropriate to allow for settlement to occur.

9. The insurer must have processes in place to allow for their claims personnel to access authority throughout the course of the claim (rather than at or in connection with certain defined events or stages in the litigation).

10. The insurer must have processes in place whereby authority can be accessed on short notice (or thought should be given to assessing the claim in advance of examinations for discovery and either providing that authority to defence counsel in advance of the discovery or encouraging defence counsel to contact the insurer from examinations for discovery on the assumption that settlement discussions are conducted before, during or after examinations for discovery).

TAKE AWAY

It is my view that there is no harm in initiating settlement discussions, whether acting for a claimant, for an insurer or on the part of the insurer itself, provided that there is a reasonable expectation that the matter can be settled. There are certain claims that should be vigorously advanced or defended or tried. However, I believe that most claims can and should be settled, provided that there is a good exchange of information and a willingness to realistically evaluate both the strengths and weaknesses of your case and that of your opponent and to factor in the risks and relative appetite for risk on the part of the protagonists. Settlement discussions should proceed cautiously and carefully - if your overtures are well received and reciprocated, you should continue to discuss settlement; if not, you should proceed with caution.