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The five major "do not do's" for maximum value settlements

THE STEPS YOU TAKE BEFORE REFERRING THE CASE TO A TRIAL LAW FIRM CAN MAKE ALL THE DIFFERENCE IN SETTLEMENT VALUE

There are numerous articles out there on how to settle a case for maximum value, the timing and use of settlement demands, and general mediation tips and strategies. Much of the content is repetitive, but there are several issues that are well worth emphasizing.

My firm tries cases – and we love and thrive on it – but we also settle a majority of them, as do most plaintiffs' firms. As many other larger trial firms do, we often get referrals from other firms. When that happens, the cases are already partially worked up. Settlement or policy limits demands may have been already sent, complaints may have been filed, and discovery may already be in progress, with depositions taken, etc. Depending on the stage of the case – whether pre-litigation or post-litigation – the first plaintiff's attorney may have already had significant interactions with the adjuster and/or defense attorneys. However, one of the most important things to remember is that settlement case value is directly impacted by all of these communications and dealings with the other side, no matter when they occur.

The five biggest issues I encounter most frequently that make it much more difficult to settle a case are as follows:

- Not fully understanding how the insurance industry works;
- Poor communication with the opposing side;
- Negative communication with the opposing side;
- Unrealistic or insufficient case value demands that impair credibility or undermine the case;
- Failing to work up a case for trial.

If the case has value above a minimum policy – and there is a sufficient

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policy to justify litigation – one typically hopes to settle a case short of going to trial. When it does not settle pre-litigation, the attorney often refers a case to a larger trial firm, hoping for a quick settlement for top dollar. By then, prior counsel may have advanced contentions or settlement demands, unsupported by reliable and sufficient documentation, that have only served to hinder reasonable further settlement discussions.

Demands made too early and prematurely without enough information typically result in the insurance company simply not having enough information for it to sufficiently evaluate the claim, and positions become entrenched. In many instances, the insurance company has likely, and understandably, undervalued the claim and has not set a sufficient reserve, which is often a difficult hurdle to overcome later.

In other instances, by virtue of less-than-pleasant communications and interactions with the opposing side, all positive communication has broken down.

Hindsight is always 20/20, but practical, well-reasoned, and informed interactions every step of the way will make it much easier for the trial firm (or yourself) to expeditiously settle the case for the most money possible. The following five factors are extremely important in obtaining maximum value. I understand that some of these do *not* dos may seem obvious, and others counter-intuitive, but trust me, after settling hundreds and hundreds of complicated cases of all different sizes, I know that we all want to avoid any impediment to the quick and satisfactory resolution of a case. So – to achieve easier and top dollar settlements:

1. Do *not* demand too much or too little – with the wrong timing

Not fully understanding the insurance system makes it much harder to settle a case. In most instances, the plaintiff's attorney assembles a standard demand packet with limited medical documents, and "demands" either the policy or a number they unilaterally state will settle the case. Unless there is such clear liability or the damages are so high that it makes sense for the insurance company to pay the policy or the initial settlement demand – cases are typically more complex – there is simply not enough information for the demand to be taken seriously.

For a settlement demand to be effective and appropriate for the case, without minimizing the value of the case or polarizing the sides, attorneys must understand how the insurance industry works. As we all know, insurance adjusters want to avoid a lawsuit and the attendant risks and costs associated with that – but it is well understood that their goal is to pay out as little as possible.

Cases where settlement demands are likely not appropriate are ones that have complicated liability or damages, multiple defendants who dispute liability who might also blame each other, excessive medical bills on lien, prior claims by the plaintiff, or pre-existing medical conditions involving the same body parts. If the case is not likely to be settled pre-litigation, a pre-litigation demand is likely counter-productive and in some cases harmful for the case.

When adjusters get a file, they consider a variety of factors that juries typically look at in deciding what damages are appropriate (e.g., actual expenses, actual losses in the form of lost income/wages, pain and suffering damages, and likely future medical costs and lost income). If the demand is unrealistically high, the demand is ignored, and the case ultimately must be litigated. If the demand is too high at the outset, it makes it much harder to settle the case for a reasonable value without losing credibility. This puts you, or the new law firm, at a disadvantage when later trying to settle the case for its true value. The unrealistic demand may detract from the genuine merits of the case, with the insurance company discounting the value in its entirety; it may even denigrate the lawyer and law firm's general reputation in the community, making it harder to settle other cases in the future.

Moreover, the demand is then registered into the insurance computer system, and becomes part of the case file for the carrier and defense. The adjuster sets a reserve (i.e., a "maximum") for what he/she feels is the reasonable settlement value of the case. This serves as a cap for the ultimate payout, and the insurance company now has a mandate, and the adjuster has every incentive, to settle the case for less than this maximum amount. The reserve sets the "bar" for the maximum dollar amount the plaintiff will be offered. This is now treated as a cap – which has to be overcome by the new trial firm after accepting the case. Typically, if a demand is made too early, the cap is too low and boxes you in to a number that ultimately is not fair and just. Although this certainly can be remedied by filing a complaint, being proactive in litigation, and producing documents that justify a higher value, the more prudent thing is not to send a demand too early, without knowing all the facts, and without producing sufficient documentation to the insurance company. For the majority of cases, those that do not have clear liability or such high damages that a pre-litigation demand is appropriate, the insurance companies need time, information, and the pressure of litigation to force a reasonable offer.

Moreover, it is critical to know who the insurance company is, what its reputation is as far as settlement, and knowing the tiers of insurance applicable to the case. Making a demand too early, without sufficient knowledge, is not likely to be fruitful or in the best interests of your client. Whether pre-litigation or post-litigation, a demand should only be made after you know who the insurance players are, the interplay between them, and after the defense has all information so they can fully appreciate the risks.

2. Do *not* get on the bad side of the defense

On more than one occasion, I have had the unfortunate situation of stepping into a case where the most work I have to do to drive the case towards settlement is rehabilitating the relationship between

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the plaintiff's former representatives and the defense. Some attorneys believe they have to be antagonistic and forceful with the adjusters and the defense. What they do not realize is that overly aggressive and hostile communications polarize the sides. If an adjuster does not like a plaintiff's attorney or their style, they will not put money on the case.

In one of the latest cases I settled, over half of the conversations I had with the defense attorney were not about the merits of the case – but how much the prior attorney alienated the adjuster. I was told that because of those interactions, the adjuster put the demand in the proverbial garbage. To make matters worse, I was also told that the adjuster would have evaluated the case far differently had the attorney been more helpful, polite, communicative, or cooperative in any respect.

The defense attorney reiterated how rudely and aggressively the attorney had conducted himself with the adjuster, and how the attorney overstated the value of the case and would not stop posturing. This prevented all reasonable resolution of the case. This was not in the best interests of the client since the case was not worth over policy (despite posturing otherwise), and it should have been settled fairly early in the settlement process.

As soon as I took over, I spent hours rebuilding the trust and communication with the defense attorney so she could communicate the positive interactions with the adjuster – and fortunately the file was retrieved from the "do not settle" shredder stack. The amount of attorney hours spent to rehabilitate the case – not because of the complicated nature or intrinsic value of it, but because of the damage done by the previous lawyer – is not in the best interests of the client or your practice. Eventually, the case settled for the policy limits.

We are all trained to be assertive advocates for our clients; however, overly aggressive tactics, unreasonable and unsupported demands, and negative interactions can backfire with the adjusters – who hold all the power in opening the right door with the prize behind it. The lesson is: getting on the bad side of the adjuster or the defense attorney by not being reasonable, thoughtful, and professional only disservices the case and your client, and your valuable time helping all of your clients in need.

3. Do *not* poorly manage client expectations

The personal injury legal field is absolutely competitive; we all know that. And we all appreciate how hard it is to land that big case and convince a potential client to sign with us – when there are countless others ready to take our place. So, we all know how tempting it is to overstate and/or oversell case value with potential clients and make promises that are unlikely to come to fruition, at least with respect to case value.

However, when our law firm inherits a case, with that often comes a client with unreasonable case value estimates, or a client who has never discussed at all, at any time, the vulnerabilities and shortcomings of their case. Often, neither have they been told about the interplay, if applicable, of multiple defendants regarding the calculation of non-economic and economic damages at trial (Prop. 51) or other issues that may affect the value of the case, such as witness issues, medicals on lien and the standard of reasonable value for services at trial, and the like.

This makes it very hard to settle a case when I have to educate a client – who has been in litigation for months or even years – and has never had a "heart to heart" talk with anyone about anything except "how great the case is." Clients have a hard time trusting the new lawyers when this conversation is had, particularly since it should have happened months ago, during one of the first meetings and throughout the litigation process. After being told for the first time that there may be problems with the case, the client develops major trust issues. They start doubting you: "Do you not believe in my case anymore? Why didn't someone tell me any of this earlier? Why didn't you do X, Y, or Z?" With that comes inflexible positions.

Sometimes they disengage and state trial is the only option (not necessarily in their best interest); in other instances, they become intractable, holding an unrealistic case value (because of the years of living with a case and not hearing otherwise). These clients agree to mediation only reluctantly and do not understand that, in their case, settlement, not trial, is in their best interest.

These positions not only take hours to overcome, but in some instances prevent a case from being settled. Although it is difficult to have those early open conversations with the client, the sooner you do it, the better, and the easier it will be to settle their case at the time of mediation. You need to do what is best for the client. In a majority of cases, assuming fair value is offered, settlement is in the best interest of your client. Informing clients of the risks and obstacles, which affects case value, is your ethical duty. Good and open communication with your clients allows them to consider the pros and cons of settlement and helps them keep an open mind, making it more likely they are open to settlement at the time of mediation.

4. Do *not* bury or manipulate records, or otherwise hide the ball at mediation

Making blanket statements to the defense attorney or the adjuster about how great the case is without bona fide, reliable documentation to back it up is counterproductive. Moreover, and although this should be obvious – do not ask treating doctors to amend already existing reports to add findings or facts that you think will help your case. In fact, these reports are all discoverable, including the prior ones. You must think ahead and anticipate that the case will be ultimately litigated. Once the case is filed and the defense sends third-party subpoenas for the doctor's files, they will get all of the reports. The one thing the defense is historically good at is meticulous review of medical records to find some discrepancy or some other reason for reducing value or not paying on a claim.

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Getting two versions of the same treatment visit from the same doctor not only raises red flags but could result in the file being sent to the insurance company's Special Investigations Unit, preventing settlement. I once had a file (in a standard auto accident case) that contained reports for the same visit, by the same orthopedic surgeon – but one of the reports contained an additional section for alleged complaints made at the office examination for an additional body part that was not present in the other report of the same date. In all other respects the report was identical. And this happened with two other doctors on the same case!

The attorney tried to explain that all of the doctors were later asked to amend the reports for this body part because it was inadvertently omitted. Not unexpectedly, the insurance company took out its entire arsenal and tore the case apart, piece by piece. Had this not happened, the case would have been treated like any other auto v. auto case – and would have been paid out for case value in due course. However, because of the discrepancy in the records, the case had an uphill battle (one which I did not have to fight because I subbed out immediately after learning of the manipulation).

No matter how well-intentioned the first lawyer might have been to have asked the doctors to revise the reports, it backfired and destroyed all possible settlement possibilities. If you believe a record does not accurately state what happened in a visit, or if more clarification is necessary, ask the doctor for an addendum or "supplemental" report, and do not lend any appearance that you are trying to manipulate anything. However, remember that the doctor may state in that addendum that it was issued per the attorney's request, which also is not necessarily in the best interests of the client.

In addition, some plaintiffs' attorneys do not readily disclose pre-injury records that are of the same body part, hoping that the records showing pre-existing injuries or complaints will not be discovered. However, since most complex, higher-value cases do not settle in the pre-litigation stage, making representations that are not 100 percent truthful as to causation of damages almost always backfires and reduces credibility later on, making it much harder to settle. Realize that the defense almost always uncovers these records. If you try to hide it, refuse to voluntarily disclose pre-injury treaters, or do not answer interrogatories truthfully, once the insurance company finds out (which they almost always do), the adjuster will likely use this against you, and it will make your client look dishonest and untruthful, reducing the value of your client's claim. Had you disclosed the information earlier and/or had advised the client to do the same, this all could have been avoided. You could have used the pre-incident records in your favor, instead of them backfiring and reducing the value of the claim after the fact.

Finally, make sure the defense has all the information they need at least two weeks before mediation – the earlier, the better. If they do not have the information they need at least two weeks before the mediation, they likely will not have the time to educate their carrier, write their report, and get the proper monetary authority to settle your case for full value (or what you believe to be full value). Anything that will increase the value of your case – e.g., future medical treatment recommendations, loss of earnings analyses, etc. – should be provided to the defense well in advance of the mediation so they can incorporate these values in their memo to their carrier to obtain adequate settlement authority in advance of the mediation.

Settlement authority is often decided by committee and/or regional/group supervisor consent at scheduled, designated meetings before a mediation. Seldom will the defense be able to obtain a significant deviation from the pre-allocated settlement authority at the mediation itself, which is why you want to ensure the defense has all the important information well in advance of the mediation, so they can provide this information to their carrier for evaluation.

This means if there is a life-care plan or economist report – give it to them before the expert designation. If there are expert and/or medical reports that you feel might help them with the valuation of the case – give it to them now. Offer a key expert's deposition before you have to per code, if this will be helpful to the defense's valuation of the case. Make sure that all party and key witness depositions have been taken that are necessary for the defense to evaluate liability and damages. Do not wait; give the defense everything! Do not think that holding back a "smoking gun" will help you at the mediation. The "aha – I got you" moment never works as a surprise attack at mediation. This tactic will not accomplish anything except frustration on the part of the mediator and the defense, as obtaining information that significantly impacts liability or damages too late will not be considered.

Often, trial law firms are asked to associate in on a case and assist with a mediation, only to find out at the time of the mediation or just before (when it is too late), that the defense does not have adequate information that was available to the plaintiff and could have been easily provided to them. When that happens, I often cancel and reset the mediation so no one wastes their time. The client now has to suffer the delay of finding another available mediation date, and ultimately delay the resolution of their case and receiving the much-needed funds to help with medical and family needs.

The point is, give the defense everything, as early as you can, and do not try to manipulate or hold anything back. This will only reduce settlement value and delay the settlement of the case.

5. Do *not* assume your case will settle; prepare a "Path to Victory"

Some attorneys assume that making a settlement demand will eventually lead to settlement. Costs are always an issue, for all of us. However, it is critical that you project that you are ready to go to trial; that you are prepared to go the distance. The defense attorney and insurance company assess a plaintiff attorney's willingness to go to trial and will take advantage if they sense weakness.

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As plaintiffs' attorneys and trial lawyers, we must always prepare the case for trial in order to settle it for maximum value at mediation. We have to be proactive. When a new case comes in, study the file right away and prepare an internal file memo outlining your review and analysis of the case, and set a written plan of action. Our firm calls this a "Path to Victory." The written Path to Victory lays out the plaintiff's claims, the defenses, what documents we have and/or still need to get in support of the claims (including medical records and loss of earnings information), the deadlines to file government claims and/or the complaint (as applicable), information necessary to maximize the claims, a list of experts that need to be hired (and the reasons for those experts), medical treatment that needs follow-through (if applicable), and a detailed discovery plan, including depositions to be taken.

Thereafter, send out written discovery and take depositions as soon as possible. The more you shrewdly, deliberately, and aggressively (but professionally) litigate the case, the more likely the defense attorney and insurance company will take notice and assign more value to it.

Offering the plaintiff for deposition and his/her defense medical examination without waiting for the defense to notice it will drive the case forward, faster. Do not repeatedly cancel depositions if you can avoid it. Provide meaningful and complete discovery responses, without frivolous objections. Non-productive discovery responses only serve to antagonize the defense attorney and delay the progress of your case.

Do not ask for multiple extensions to respond to discovery requests. Do not make the defense file motions to compel simple discovery to which they are entitled and need to evaluate their case. When defense files these motions it can affect the reputation of the plaintiff's attorney, which may be reported to the insurance company and reduce the value of the settlement. Any delay regarding discovery only benefits the defense, since they have no real incentive to move the case forward – they simply have to react.

The failure by plaintiff's counsel to follow through on any step benefits the defense. Defense will delay and delay – if left to their own devices – which is even easier to do in today's climate because of the court system. It is the plaintiff attorney's job to drive the case forward toward settlement. In addition, staying on top of the file and maintaining good communication with the client is very important. Developing a personal relationship with the client will build trust and help manage their expectations throughout the process.

In essence, the more prepared and proactive you are with the case, the more likely it will settle for its top dollar at a mediation. Do not assume the case will ultimately settle if you do nothing but make a demand, and the client gets medical treatment on lien, driving up the medical expenses. You must prepare the case for trial, and be ready and willing to try it, for it to settle for maximum value.

Conclusion

Without belaboring the point, the highest value cases I have ever settled have gone like this: there were no prior settlement demands that either hampered settlement discussions or polarized the case; my relationship with the defense was professional, amicable, and friendly while still being a fiercely strong advocate; the defense had all available, credible and reliable information it needed to properly evaluate the case; and the case was litigated with the appearance of the willingness and readiness to go to trial. Following these "do not" tips helps ensure cases can be settled faster and easier, for maximum value.

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