The Settlement Process

The vast majority of personal injury cases are ultimately resolved through settlement, rather than through trial. There are various stages at which personal injury cases are most likely to settle. Knowing this will allow you and your client to concentrate your settlement efforts around these opportunities.

The first chance for settlement occurs shortly after medical treatment is completed. After gathering the medical bills and reports, you will evaluate the case and provide the insurance company with a settlement demand. An offer hopefully follows. Sometimes that is all it takes to wrap up the litigation. To gather your client’s medical bills and reports, send a written request to your client’s doctors and therapists, and any hospitals that treated your client. You usually have to pay for these records. Using a HIPAA confidentiality authorization will help to avoid delays. I have provided the authorization I use in Appendix 13. It is rarely rejected.

“I brought him along to assure you we would negotiate in good faith.”

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Settlement Demand Letter

It is essential that you prepare a comprehensive and professionally written settlement demand letter. Three sample settlement demand letters can be found in Appendix 5. The settlement demand letter summarizes the strengths of the case and alerts the insurance company to its potential financial exposure. As with other stages of the case, you are trying to create a positive impression. In the eyes of the insurance company, if the settlement demand letter is not close to perfect, the settlement value of your claim drops.

Professional Appearance

If your letter is well organized and professional in appearance, the insurance company will assume you are likely to present an effective case at trial. This exposes the insurer to significant financial risk, which is the goal of the settlement demand letter. If the letter contains typographical errors and is poorly worded and organized, the insurance company concludes that you will be similarly poorly organized for trial. The company will be less concerned about a large jury verdict, since putting on an effective trial takes tremendous organizational and communication skills.

Print the letter on professional looking stationery. Write the letter in a dynamic voice to compellingly make your points. A passively worded letter subconsciously affects the reader in a way that is to the writer’s disadvantage. For example, write, “The impact injured Mr. Jones’ left shoulder” rather than, “Mr. Jones’ left shoulder was injured by the impact.”

This is not a creative writing contest. Use short sentences and remove any excessive “fat.” You should not waste any words in this letter. Get right to your strengths, make your points, and make your settlement demand. If you are attempting to convey two distinct ideas, write two separate sentences.

Write like a lawyer. That does not mean you should use a lot of meaningless words like “herefore” and “thereinafter.” That will only demonstrate your inexperience and insecurity. You should clearly, directly, and forcefully itemize your client’s losses and damages and the reasons your client is entitled to a substantial settlement.

Attachments

Be sure to include organized copies of the medical bills and reports with your settlement demand letter. Arrange them in chronological order, beginning with the ambulance bill, emergency room bill and report, bills and reports from the primary physician, followed by the bills and reports of any specialists your client saw. Next, include physical therapy invoices and reports, and then any bills and prescriptions for medical equipment. Send the property damage appraisal, wage loss proof, original photographs of the property damage and of cuts, abrasions, scars, etc. Provide any other documentation that helps to prove the losses and damages.

Package the settlement proposal attractively. Put all documents into a binder, using exhibit tabs that stick out at the bottom. Make it easy for the insurance adjuster to understand the points you are making and find the documents you are referencing.

Colossus

More and more insurance companies are relying on Colossus. Colossus is claim assessment software that computes the value of personal injury claims involving motor vehicle collisions. Colossus breaks the claim down into factors that help the insurer evaluate it. The insurers believe it takes some of the guess work out of claim evaluation. Allstate in particular is known to use Colossus.
If the insurer who is evaluating your client’s claim is using Colossus, you may wish to tailor the settlement demand letter so that it emphasizes the information that Colossus focuses on. To greatly simplify a fairly complicated topic, Colossus focuses on diagnosis, prognosis, treatment, duration of symptoms, permanent impairment rating, disability from work, and loss of enjoyment of life.

I have only recently become aware of the possible importance of tailoring settlement demand letters this way. I am not able at this time to offer an opinion as to the value of this approach. I can tell you that I am concerned enough that I have started taking it into account in my practice. To learn more about Colossus, I recommend you read “Colossus: What Every Trial Lawyer Needs To Know,” by Dr. Aaron DeShaw, Esq.

The Power of Words

As any linguist will tell you, words have great power. A single word can greatly influence perception. It is very important to choose your words carefully when crafting your demand letter, and throughout the litigation process.

It is common to call a collision between two cars an “accident.” The problem is that the word “accident” is used in our vernacular to indicate something that occurred through no one’s fault. Webster’s New World Dictionary defines “accident” as a “chance happening or mishap.” Calling a collision an “accident” tends to create an inappropriate bias for the defendant. It creates a conscious or unconscious misunderstanding that the incident was fault-free, or “a chance happening.”

You will notice that defense lawyers and insurance representatives always use “accident.” In closing argument to the jury, a one-liner used by some insurance company lawyers is, “Accidents happen.” This suggests to the jury that no one should be held accountable. It was no one’s fault. My one-liner response is, “Carelessness causes accidents.” Since personal injury litigation is about fault and damages, it is important to minimize use of the word “accident.” I prefer “incident,” “impact,” or “collision.” For bad collisions, I use “wreck” or “crash.” Even “fender bender” is better than “accident.” In your settlement demand letter, during depositions, and during trial, stay away from the word “accident.” If it slips out, don’t worry about it.

Similarly, insurance company lawyers refer to collisions between cars and children as “child dart out” cases. Smart plaintiffs’ lawyers call them “pedestrian knockdown” cases. The label we place on a situation may influence how it is perceived.

In every personal injury case, the defendant is entitled to what is typically called an “independent medical exam” or “IME.” Clever plaintiffs’ lawyers refer to it as a “defense medical exam” or “DME.” Official court rules of procedure may use the term “independent medical exam,” which is surprising, given the nature of the typical “IME.” The exam is usually anything but independent. The doctor is hand-picked by the defendant and/or the defendant’s insurance company. The doctor is often chosen because of a willingness to write reports and offer testimony furthering the interests of the defense, at times without much regard for reality.

It is important for plaintiffs and their attorneys to call this exam a “DME.” Calling a defense medical exam an “IME” sets up a psychological context and expectation that is against the plaintiff’s interests. In written correspondence, legal filings, and depositions, and even during trial, referring to this exam as a “DME” communicates a different view to the insurance company, their lawyers, the judge, and the jury.
Never underestimate the power of words. Just as an auto collision involving a child should be called a “pedestrian knockdown” rather than a “child dart out accident,” the insurance company doctor’s medical exam should be called a “DME.”

Getting a Response

Insurance companies usually take a minimum of two weeks to review settlement demand letters and respond with a settlement offer. Frequently, your settlement letter and supporting documents are reviewed by various employees at different levels of authority. The larger the case, the more layers of review and delay you can expect before an offer is made.

Within a few days after mailing the settlement demand letter, you may wish to contact the company to make sure they received it. It is not unusual for important documents to get lost in the mail. A follow-up phone call can save aggravation down the road. Nothing is more frustrating than waiting two or three weeks for a settlement offer, only to discover that the insurance company claims it never got your letter. By sending it certified mail, you will have proof that it was received. Overnight mail ensures prompt delivery.

Within a couple of weeks after confirming receipt of the letter, call the insurance company to see if they have a settlement offer. If you do not call, you may never hear from them. Insurance companies tend to put settlement letters on the back burner, waiting for a follow-up call from the plaintiff’s lawyer.

Claims Representative

Often, the first time you speak with the claims representative about settlement, there will be some kind of excuse for why a settlement offer cannot be made at that time. Do not get frustrated or angry. If the explanation is reasonable, be professional and courteous. You will know you are being strung along if you are confronted with a series of lame excuses. If that happens, proceed directly to the next chapter of this book because it is time to file suit.

You want the claims representative to respect you. During your discussions, be professional and polite, yet forceful and assertive (not hostile). Be very clear in your resolve to take this case to trial if necessary. Be ready to address any questions or concerns the claims representative may have. Try to think of settlement as a mutually desired goal. Do all you can to help the claims representative get there.

If you negotiate professionally, courteously, and assertively while effectively addressing all questions and concerns, you are probably well on your way to settling the case fairly. If you make an enemy of the person who holds the purse strings to the settlement, you will regret it. Claims people do not settle with plaintiffs or plaintiffs’ lawyers they dislike. They have the power to make your life miserable. Do not tempt them to do this.

Incomplete Information

When you send the settlement demand letter, the insurance company is working with partial information. You have selectively presented them with only the strongest aspects of your case. For example, if your client was in another fender bender a year earlier, you may choose not to disclose that in your letter. At this stage, you are not legally required to do so. Your client’s doctor, however,
may have included the prior collision in the medical report, which would obviously alert the insurance company.

The insurance company is aware that they are receiving incomplete information. It is only after suit is filed and the discovery process is completed that the insurance company can know for sure that it has a complete picture of your client and the case. You cannot expect to settle the case for full value until after you have successfully gone through depositions and discovery. See Chapter 10 for a thorough discussion of depositions and the discovery process.

You may be asking yourself at this point why you even went through the process of sending a settlement demand letter. You can skip this step entirely and move right to filing a lawsuit. However, if the injuries are relatively minor, you may be able to settle without filing suit. The settlement demand letter is indispensable if you hope to settle pre-suit.

**Skipping the Demand Letter**

If your client’s injuries are more serious, you may want to jump directly to the lawsuit stage. That is the only way to get full value for a larger case. However, even in larger cases, there are benefits to going through the process of sending the settlement demand letter. A comprehensive settlement demand letter forces you to organize your thoughts and your file. This will improve your understanding of it. It will also show the insurance company that you are organized and are putting time into the file.

**Deception in Negotiations**

Is it possible that the rules of ethics legitimize, even encourage, deception by lawyers? [Insert lawyer joke here.] Rule 4.1 of the Pennsylvania Rules of Ethics states, “A lawyer shall not knowingly make a false statement of material fact or law to a third person.” That seems clear enough. Assume my client is offered $100,000 to settle her case. She specifically instructs me to settle the case, as she desperately wants to avoid trial. Am I permitted to tell the other side that the case absolutely cannot settle for $100,000?

Surprisingly, the answer is yes. In settlement negotiations, both sides are permitted to use puffery, and even outright fabrication, to improve the outcome. The rules of ethics require lawyers to fervently represent their clients. This apparently permits what would otherwise be forbidden behavior. Does this make the lawyer more honorable than a car salesman who tells a customer that he cannot sell a car for less than $20,000 and then sells it the next day for $17,500?

Rule 4.1 of the ethics rules forbids a lawyer from making false statements. One of the explanatory comments to Rule 4.1 states:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.