CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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# Predictive Analytics in the Resolution of Transportation Claims

## I. A Predictive Model in Graphic Form

### Understanding "Inter-party Tension" related to commercial vehicles

Commercial vehicle litigation often involves matters with escalated tension existing between the parties. Vehicle operators are held to higher standards and certification requirements. Due to the size and mass of the vehicles involved, simple collisions often produce spectacular results. General perception of vehicles like semi-trucks, tour busses or the like is less than favorable. At the beginning of the litigation process the tension that exists between parties is often at a high level. Decreasing this tension throughout the process may lead to a more conducive environment for settlement to take place.

### Defining "Motivation to Settle"

A compromised settlement is often in all parties best interests as opposed to the uncertainties associated with trial outcomes. At the outset of the claim/litigation, the motivation to settle is generally low. Offers may have been made at lower levels or not at all. Increasing the "money on the table" is one way to increase the motivation to settle. But this element of the model can be systematically increased by effectively communicating the strengths of the defense to the other side either directly or through a mediator. Also, understanding the plaintiff's non-monetary desires or needs can prove to be an important consideration.

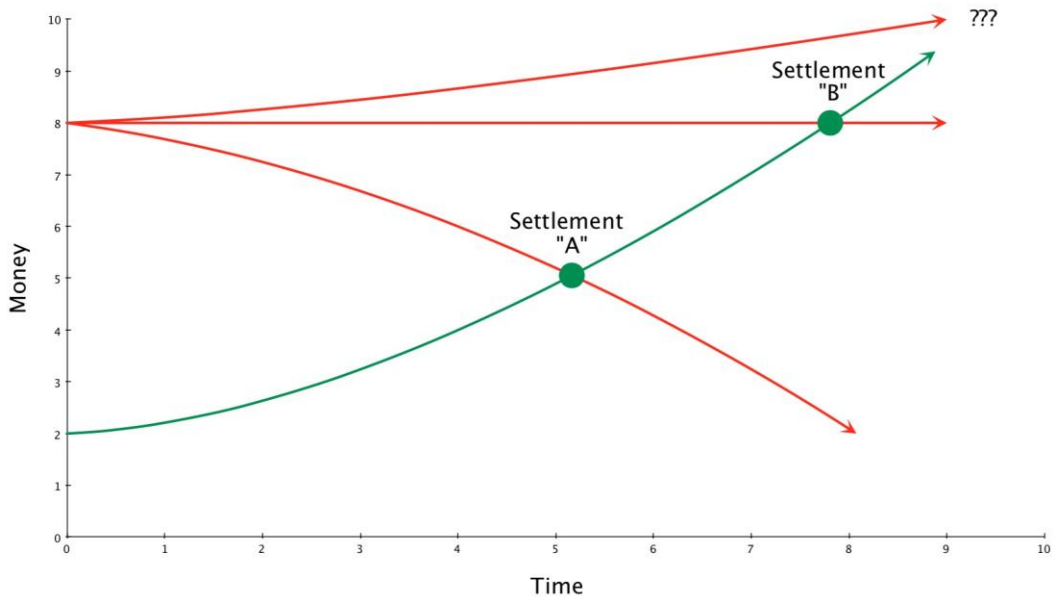
### The Playing Field: Indices of TIME and MONEY

The model examines the interplay of the two above elements: tension and motivation. In the real world this does not take place in a vacuum. For this reason the elements are tracked graphically using indices of time and money. In litigation, these are often related and have a high degree of correlation. Once one understands the model, specifically how resolution outcomes can be evaluated through the efficacy of managing the individual elements, it can serve as an evaluative tool for the past or a predictive tool for the future. Decisions can be evaluated before made to gauge the potential effects of different paths available.

## II. Confluence – Where Things Come Together

**Settlement often occurs at the intersection**

Effectively reducing the inter-party tension and successfully increasing the motivation to settle produces an intersection of their respective line forms on the graphic model, as time progresses. Variations on the degree and rate of these progressions will produce different measurable results in the final outcome.




The difference in potential outcomes can be witnessed in the above example. Failure to effectively reduce the inter-party tensions could lead to "Settlement B" as opposed to a more desirable result shown as "Settlement A." In extreme situations, actions that actually escalate the tension could jeopardize a settlement. Much has been written about purposefully demonstrating empathy throughout the resolution process, and the effect this has on both the time and inevitable expense in both indemnity dollars and litigation costs. The model serves to highlight the potential value of not adequately doing so. While it may seem obvious, the model serves to validate the expression that "a picture is worth a thousand words." For those who may question the validity of the model, we offer the following example.

**The Horror story in the Short Bus**

A mentally disabled individual was transported several days each week to a community-based program, where she received services commensurate with her disability. On one trip, she allegedly tripped over a seatbelt en route to her seat. The resultant fall against another bench in the bus led to a spinal cord injury causing

tetraplegia. A mediation took place and the negotiations progressed towards settlement. A demand of $1.1M was made in counter to an offer of $700K. The mediator spoke with the defense caucus an indicated a strong belief the case could be settled for a total of $900K. Up to this point there had been no interaction between the two sides, other than through the mediator. The claim professional requested to speak directly to the plaintiff attorneys. In that discussion the individual quipped, "What does she need money for anyway, she's retarded." The reaction of the plaintiffs was to immediately to terminate the mediation. In short the tension had not been addressed at any point in the lifeline of the litigation, in this instance it had been exacerbated to an extreme. Inevitably the case resolved via binding arbitration for $1.5M. Had the mediator been correct in the claim the case could have been resolved for $900K, the effect of an insensitive comment cost an additional $600K, additional time and expense, and a clear opportunity to obtain a release for an insured.

**Time and Money – Litigation Costs in Transportation Cases**

Commercial vehicle claims may be similar to common motor vehicle accidents in terms of the basic concepts of physics and liability, but litigating them involves a much greater scope of demands. Issues arise regarding the heightened degree of accountability expected of drivers, maintenance departments and transportation companies. Expert witnesses are often engaged that are not commonly called upon in cases involving passenger vehicles. A discussion of the magnitude of the added litigation costs involved will focus on the expense progression throughout the different phases, up to trial itself.

**The Value of Certainty**

In the above case example, an opportunity to extinguish the claim and obtain a release for the insured company presented itself at mediation. The actions of the defendant representatives led to an extreme, cessation of negotiations. Regardless of whether additional costs resulted in the way of indemnity payments or litigation costs, the insured was still left in a position with pending litigation and the risk of an excess verdict at trial. The decision to purposefully mitigate tension begins at the outset of the claim, and opportunities to continue to do so may present themselves all throughout the lifeline of the claim/case. The cost to do so may be one of the most insignificant elements of case handling, yet the return on investment may be profound and lead to opportunities to obtain a release that would be absent without being proactive.

## III. Mitigating the Tension Between Parties – Art

**Starting in the hole – target defendants**

People don't like trucks. Regular reports are issued about airline travel satisfaction, highlighting the least favorite carriers, accidents involving charter buses often make national news. Defending a religious organization in the "bible belt" may work in the favor of the defense. Transportation claims are often just the opposite. With the plethora of rules and regulations inherent in transportation law, it becomes easy for plaintiffs to allege a breach of conduct. Members of the millennial generation generally attach greater significance to a departure or variance to these mandates than baby

boomers. The severity and effects of accidents often are much greater and yield catastrophic injuries. For all of these reasons, the inter-party tension can begin at higher levels than those associated with non-commercial claims. Understanding this dynamic should raise the collective awareness of the need to look for opportunities to reduce it.

**The toolbox – learnable skills**

Decreasing inter-party tension may sound challenging, but it is often a matter or showing respect and appropriate empathy. There are however certain learnable skills that can be employed which can produce meaningful reductions. Here are four of note:

- Showing Propriety – appearing and acting professionally
- Demonstrating Credibility – communicating experience and capability
- Finding Commonality – finding shared interests or experiences
- Expressing Intent – more than anything of the above skills, being able to genuinely and succinctly express one's intent, has the power to yield dramatic reductions in inter-party tension.

**Elevator talks**

An "elevator talk" is a brief introduction delivered to someone in the amount of time it would take to ascend from the ground floor to your destination in a tall building. There is no set time limit, but 30-60 seconds is a good rule of thumb. Having an elevator talk prepared to express intent directly to the plaintiff can be a powerful tool. It must however not be disingenuous, and it must be delivered in a way that makes it clear to the plaintiff what your role actually is. It gives one an opportunity to distance one's self from the actual tortfeasor, to state what your role is professionally, but to express a measure of humanity in the form of empathy and a willingness to compromise and listen.

Sample for opening of mediation: *"Mr. and Mrs. Smith, my name is Samantha Jones and I represent the Acme Widget Company. While my job is to defend them in this lawsuit, that doesn't mean I'm not human, and that I can't recognize that you've been through something terrible in the loss of your son. I have no life experiences that would allow me to fully understand what you've been through these last 24 months. All I can promise is to listen and do my best today to see if we can come to some form of agreement that will be satisfactory to you. Thank you for making the time to participate in this process today."*

**Front end investments yield good returns at the end of the day**

These skills applied at the outset of a claim/case, whether in an introductory phone call or at the beginning of a deposition or mediation can be considered investments. Their return may not be evident until the end of the lifecycle. When the best pre-trial offer has been extended, and the decision falls on the plaintiff(s) as to either accept or continue on to a courtroom, they may base that decision on how they feel they have been treated during the process. Do they feel as though anyone on the defense side has taken the time to listen to them or studied the effects of an accident on their future? Often these become things that can tip the scale if they find a decision represents more compromise than they had intended to make.

## IV. Increasing the Motivation to Settle - Science

### More Money

This is the easiest way to increase the motivation to settle.

### Systematic disclosure of the strengths of defense

We are all guilty of seeing things from our own perspectives and not taking into account the viewpoints of others. In laying out the strengths of your case, you may begin to dilute the strength of the other side's case in their own mind. When done in a mediation context, adding the mediator's voice to yours can amplify this effect. In transportation claims, it is not uncommon to be facing opposing counsel whose practice scope is broader and more general in nature. They may not fully appreciate or understand case elements that are basic to your normal practice. Voicing these defenses at the right time, can serve to increase the other side's motivation to settle without a corresponding increase in an offer.

### Unique elements to consider in transportation claims

Because of the unique laws and higher degree of regulation within the transportation industry, there exist opportunities to explore a broader palette of liability defenses, motions in limine, and summary judgment strategies. The panel will discuss how these possibilities can be tactfully introduced into the negotiation process.

### Working With and Through Mediators

A mediator generally has a better sense of the atmosphere in the plaintiff's camp. To the degree you can convince the mediator about the strengths of your defense, you can indirectly influence the plaintiff and their counsel. When deciding on an action that could increase the motivation to settle but may increase the inter-party tension, the action can be discussed and the mediator can then be better prepared to mitigate the tension-building aspects of the action.

## V. Application – Decision Making During Negotiations

### ITT – If this then that

Understanding the mechanics of a golf swing can allow one to diagnose and correct for problems that are producing unfavorable effects. In the same way, an understanding of the predictive model introduced here can allow one to make decisions based on the effect of specific actions. Potentially inflammatory offers or responses to demands can be suitably buffered through careful discussion with a mediator, or at least appropriately couched when made directly. The model can produce analytics for both evaluating past actions and determining future courses of action.

**Target the low side of reasonable**

Landing a six pound fish with 10 pound test fishing line is much easier than landing a 10 pound fish using six pound test. The latter requires a certain amount of gentleness and attention to detail during the battle. In the same way, cases can be settled easily when a premium is paid to do so. Settling the same case for a discount is more challenging, but not impossible. Valuing a physical injury is not a precise science, and values occupy ranges as opposed to specific dollar amounts. Once offers begin to be made that fall within the reasonable range of value, counsel for the plaintiff must begin to inform them that he or she can no longer "nearly guarantee" that a verdict will be higher. In so doing the decision making responsibility begins to rest fully on the plaintiffs shoulders. It is at this moment that all of the front end investment and all of the effort dedicated during the cases life may provide an unexpected return in the form of a settlement below what was expected.

**Model review – putting it all together**

The model can be used to evaluate a claim that was settled largely by correspondence and telephonic communication. When a multi-disciplinary team is working together in a mediation setting, their work together can be like a musical group playing in harmony. Each member of the group has a separate part to play, and the combined effect is to produce something pleasing to the ear. A claim professional may work more on decreasing inter-party tension. Defense counsel may focus increasing the motivation to settle by effectively communicating the merits of the defense through the mediator. A settlement consultant can help in both regards, often in interfacing with the plaintiffs or helping determine if offers can be made in a form that would be more attentive to the plaintiffs needs and/or attractive to them. All in all, once one understands the premise of the model, the analytics and determinations flow naturally out of that understanding. A greater sense of perspective can help protect against myopic or subjective decision making, and better results can be realized. While with any data set, there will be deviations from the norm, the model provides an effective manner in which to both evaluate and chart future action.