



2022 Focus November Conference
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Nuclear Negotiations Made Simple for Subrogation Cases

I. Negotiation Strategies

Modern Importance of Negotiation

More than 95% of lawsuits settle prior to trial. These are claims where suit is filed. Imagine how many more are settled prior to suit. In opposition to contemporary legal and claims culture. Dozens of law school and claims courses teaching you how to handle the vast minority of cases, but what about the majority that aren't litigated? Too little emphasis on most important tool to be a successful adjuster or attorney. Limiting Potential Defense Verdict. Lower Total Costs. Insured Expectations and Preferences. Time Value of Money.

II. General Negotiation Tactics

Think Like a Plaintiff's Attorney

Our industry is defended focused. Subrogation is the plaintiff's side without the terrible clients. We need to think like a plaintiff's attorney. Our goal is to bring in dollars. We have to get creative and create liability in cases such as rear-end collisions and slip and falls. Five of our top 10 recoveries (7 figures) have been on files marked no-subrogation or rejected by other firms. We do not want to use defense counsel for subrogation.

Creativity and Actions are Key

Defending cases is formulaic and claims can largely be handled through set procedures. Plaintiff's work is different because you need to build a persuasive narrative and then fit elements of the legal claim within the story. You are the storyteller and make/break your case with how creative you can get.

Just Ask

Stop over-thinking! You never get anything unless you ask for it. Make the ask even when you expect a no. No doesn't always mean no. Example case: Most Recent- Cow accident (\$325,000). Too many attorneys overthink things – cases rejected by other attorneys, and I resolved in 5

minutes. I have recovered millions of dollars on claims by simply asking for it. Ask for full payment, if not forthcoming, then ask for an offer.

You Catch More Flies With Honey

Building a relationship is critical. Make adverse adjuster/attorney want to help you. Get to know them and get to a personal relationship as much as possible. Disclose personal information to create trust. Mimic behavior/speech patterns, etc. Provide small favors. It's a small industry. Take notes to refer back to. Help them achieve their targets. An example is *Strublic* (Insurance/claims industry and future relationships) and *LG*. (Transactional vs. Relational Negotiations).

Win/Win Deals

Negotiations do not always involve conflicts or adverse approach. Find ways to make settlement a win/win. You won't win by solely pushing your perspective, instead you want to lead a horse to water - convincing them of why they win. Go for the win but put communication in terms of mutual benefit and compromise. More difficult in transactional settings such as subrogation negotiations. Stress defense costs. Stress excess exposures.

Be Willing To Walk Away

In any negotiation, you want to be ready and able to walk away. Develop your Best Alternative to a Negotiated Agreement ("BATNA") early. Take steps to enhance your BATNA and limit your adversaries. Build Roadmap – Can I litigate? Is it a defense cost case? Will insured be terrible witness? Set your bottom line early and build around this. Don't be afraid of saying no – negotiate later.

Use Your Ears (70/30 Rule)

You learn more by listening. Let them spill the beans. Take notes on all calls. You gain more leverage when you say less. Listen 70% of the time and speak 30%. Ask diagnostic questions. Use silence as a tool. Embrace the awkwardness of silence. Pause after they make an offer.

Knowledge As Leverage

Knowledge is power – power is leverage - leverage is money. Important things to know are the facts of your case, legal basis for claim; practical legal aspects (judges, local rules, recent cases, jury pool, etc.); and negotiation skills. The party who knows the most will have the leverage in negotiations. Don't recreate the wheel – use online resources (MWL Charts, legal blogs, etc.)

Investigation Is Basis For Negotiation

Time spent investigating builds basis for positive settlements. Obtain all documents, witness statements, expert positions, scene diagrams, ECM data, dash cams immediately. Have necessary supports to prove your claim before making demand. Include detailed investigative

outline in your demand. Knowing all facts both good/bad allows you to structure negotiation and set BATNA/strategy.

Set The Anchor

Anchoring and Adjustment Heuristic. The adversary will use the anchor point as a start and adjust accordingly. This means to always demand the highest amount that you can reasonably justify. Use precise number to imply purpose. Example: *Struble* (\$175,375 despite only \$10,000 medical specials). Psychological basis- Why it works! Example: Ghandi's age (died at 140 vs. 70) – doesn't even need to be realistic. Example: Framing use of 1 million or large numbers. Include any possible damage claim such as high valuations on fluid damages, uninsured loss, loss-of-use, diminution in value; punitive damages; and bad faith.

Framing

Strategically consider what you say and how you say it. Many complex psych tactics add small % benefit, however in combination and across numerous negotiations the impacts can be huge. The choice of words can create subconscious impact on adversary. Use words that can frame and create open mindedness before starting negotiation (expansive, open) even telling unrelated stories about your child having open mind to try new food or mentioning a visit to the grand canyon. Use words that increase value perception, my daughter has 1,000,000 followers on TikTok, the national debt is \$28 trillion, proven to create marginal increase in ability to consider higher numbers. Study Example: Participants in two groups different times – read words (old vs young) – walk to other room. In short, words can have an impact on other's subconscious.

Other considerations: Framing gain vs. loss – Average person more risk adverse and fearful of loss than wanting of gain. Frame argument so that failure to agree results in their losing money. Framing with menu of options: (1) Refuse to negotiate and incur \$20,000 in defense costs, (2) Pay 100% of our claim and avoid suit, or (3) put forward a reasonable offer.

Justification Heuristic: Simple presence of justification (because) makes message more persuasive. Credibility subconsciously assumed. Example: May I use the copier? (60%) / May I use the copier, because I need to make copies? (90%) / May I use the copier, because I am in a rush? (94%). Applied to Claims: Can we settle this claim so that we can both avoid hefty legal bills? Etc.

Say No To Template Tactics

Do not use template tactics! Every case is different. Do not "split the difference" or "meet in middle"! Do not agree to three-way splits! The easy and lazy way out. Only use this strategy once you are nearly at an acceptable point and looking to add icing to the cake. Do not "make first reduced offer"! But Make Initial Demand!

Refrain From Making The First Offer

Making the first offer is negotiating against yourself. By making an initial reduction, you reduce the size of the pot unilaterally. You also limit the chance that the adverse may make an even higher offer. In all, but the most limited of situations, never make the first offer.

Do Not Take Things Personally

Emotions can run high in negotiations, and you don't want to let them get the best of you. Uncontrolled anger or dejection may reveal bad facts. Approach things rationally and stay friendly (usually). Some negotiators purposefully will play emotional games, don't play into their tactics. Remember that both sides are just "doing their job" and remind your adversary that you are looking for a fair resolution.

Strategic Use of Emotions

Positive emotions will open up your adversary to your perspective. Also use emotions to change course or weaken footing. Get angry. If you seem angry your adversary may make concessions as to reach compromise/avoid deadlock. Anger should be towards deal and not personally at adversary. Be disappointed/disgusted. Try using "really?" "are you kidding me?" or some variation. (only use for short-term relationships). While good relationships are key, it is sometimes beneficial to steam roll an opponent. Look for weak or lazy adversaries who appear more willing to compromise than engage in argument.

Levels of Authority

Always consider and inquire into the levels of authority. Does the adjuster or attorney have settlement authority? Who does have the authority, and can you speak directly to the source? Use levels of authority to your advantage. Suggest settlement at a value instead of making a formal offer. Play good cop/bad cop.

Form of Communication

Be strategic in determining best form of communication. Dependent on individual and case details. Typically, the best form of communication is that which is most personal. Try phone over email (video is #1). On the phone you can use your listening skills to record subtle hints and negotiation skills to obtain hidden details and concessions. People are more honest on the phone and/or willing to disclose inappropriate or helpful information that would not be included in an email (policy limits, difficulties with case, etc.). Always confirm oral conversation in writing, specifically when deal is struck. Consider control tactics – (A) You make the call (or set time), (B) Earlier in day (stronger impression), (C) Consider proximity to mealtimes (increased glucose reduces aggressiveness), (D) Physical warmth (coffee/temperature) increase friendliness (insular cortex impact).

Set Deadlines

Use deadlines to control the pace of negotiations. Be willing and ready to act on those deadlines. Don't let yourself be subject to deadlines. The person with the deadline looming loses leverage. Deadline to file suit. Deadline to transfer to attorney. Deadline to serve discovery. Deadline to set depositions.

Practice and Prepare

Always prepare for any negotiation. Develop a visual tool to help review current offers and consider next steps. Take 15 minutes before telephone call and review notes. Play devil's advocate. The person who prepares most will typically come out victorious. Keep learning and study negotiations.

Always Counter

Keep negotiating until there is nothing left on the table. It is rarely the case that a final offer is final. Counter! It never hurts to try. Don't be lazy. Strive for greatness, not good enough. Remember that offers almost indefinitely stay on the table. I have never had an offer pulled – so I don't take this threat seriously. Studies have shown that adversaries are happier with deal when first offer isn't accepted.

Miscellaneous Strategies

Circular Yes. Psychological Tactics – Be Aware. Grammar and Language. Avoid negotiation terminology. Say No. Do not rush! Offer to draft contracts. Nibbling. Unreciprocated Requests – Nonlinear Negotiations. What Ifs. Iceberg Theory. You Can Negotiate Anything!!!!

III. Subrogation and Litigation Specific Strategies

Bomb Throwing Demand Letters

Take the time to draft and send a detailed and substantive demand letter. Get the low hanging fruit. First impressions matter so put best foot forward. Include photographs, citations, witness statements, and anything else that could lend support to your claim. Be hesitant to send Expert Reports (or request them). Send to the insured and insurance carrier. Include deadlines and threats.

Befriending Defendant (Prior To Defense Counsel) Subrogation Claims

Speak with defendant and develop a positive relationship prior to retention of defense counsel. Demand in excess of limits to create wedge between Defendant and adverse carrier. (consent judgment?) Go to the source and obtain all information prior to a defense being built. Obtain admissions to be used later – get affidavits! Create an ally for settlement with insurance carrier or other parties. Course and Scope Cases Example: Alliance Liquid. Bad Faith Assignment - Team up with defendant to pursue carrier through an agreement to assign bad-faith.

Consider Uninsured Loss Subrogation Specific

Always take time to speak with the insured and consider whether there is uninsured loss. Ask the insured if they intend to bring a lawsuit or are willing to waive this claim. If waiving claim, then this should be used directly for your advantage. Example: Small personal injury in trucking claims, wherein already pursuing loss-of-use. If not waiving, then should be used as threat and/or enter into Joint Prosecution Agreement (“JPA”). Example of good JPA (Work Comp)

Defense Cost Offers/Multiple Defendants

Defense cost settlement value increases exponentially with multiple defendants. Notice all potential defendants. Example: Products Claims: If cause undetermined, try combined defense costs. Consider defense costs/nuisance value prior to suggesting closure of any file. The cases that I am proudest of are those where I have created value when I had no possible way of winning in litigation. Example: Dixon, Nos. (\$60,000 / \$40,000). If you have opened a claim and spent the time on testing, you should do all that you can to collect. If high dollar value, then settlement potential.

Demand in Excess of Policy Limits

When possible, demand beyond known/assumed limits. Create wedge between insurance carrier and insured. Fear of personal liability can turn an enemy into an ally. Insured will become an ally in convincing the adverse carrier to settle. Contact insured if not represented and work together to recover from adverse carrier – exchange for no excess claim.

Spoliation For Advantage

Spoliation can be used to the plaintiff’s advantage. Adverse inference, independent action, other sanctions. Get creative and use whenever a defendant has retained or should have retained evidence. Example: Rental Car Companies. Example: Adjoining apartment units (water damage), neighboring homes, and fire. Defense/Liability – Review file to find any argument that the Plaintiff has spoliated evidence.

State-By-State Third-Party Claims

Many states laws governing standards that claim adjusters must follow when settling and negotiating third-party claims. Research the state-by-state claim handling guidelines and use to your advantage. Argue that they must respond timely, make a fair offer, and respond to a fair offer.

1st Come, 1st Serve

Review and consider those states with 1st come, 1st serve laws. Connecticut, Kansas, and Texas are just a few of the states which employ this method. This approach allows the liability carrier to settle any or all claims in the order that the claims are presented. Once the carrier has exhausted the policy limits, its duties under the contract are complete and the carrier has no duty to make sure all claimants are paid. Negotiations will be different in those states as you

have an incentive to move immediately to facilitate settlement. Incentive to negotiate early and resolve pre-suit.

Insane Discovery Requests

Work with legal counsel to utilize discovery requests as a tool to promote early resolution. Serve highly complex and labor-intensive requests and immediately follow up with statement that “you are happy to provide an extension to answer if they are interested in discussing early resolution.” The smaller the cases, the earlier to send detailed requests and set depositions, inspections. Give discovery a dual purpose.

Offer of Settlement/Judgment

Use offers of settlement to increase leverage and promote speedy resolution. Don’t expect attorney (unless using MWL) to take the extra time to draft the Offer of Settlement. State-by-state variations. Be prepared for them to accept. It is an art in determining the right place to offer – work closely with attorney.

Use Alternative Dispute Resolution (ADR)

I am very skeptical of the recent move towards increased arbitration given the inconsistent results. Arb bad for complex cases or intricate legal analysis. Excellent for simple auto and/or clear liability w/ multi-defendants. Look into Arb Forums early to avoid later issues. Offer voluntary and mutual arbitration (specifically with clear liability and multiple defendants. Early mediation when Court will mandate either way. Consider in jurisdictions where pre-suit mediation will be able to serve as the required mandatory ADR.

Expertise In The Use of Experts

Get creative with use of expert witnesses. Especially impactful in product defect or installation claims. Experts can make or break your case. You should become an expert at selecting experts – interview. Build data-base of experts (contact me). Know what type of expert. Shy away from expert Reports (unless not litigating). Use threat of testing/inspections to facilitate settlements.

Do Not Fear Referral

Do not fear referring a file to counsel. Use counsel as negotiation play – even on files that may not be litigation worthy. Some adjusters or self-insured entities won’t negotiate until suit filed. I have recovered millions of dollars for clients on claims where I probably shouldn’t have received a dime. Sometimes a simple letter from a law firm will increase value. 85% of 100% is better than 100% of 50%. Select Lawyers Carefully! Think knowledge, quality of work, responsiveness and data security.