

GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

**FREE DOWNLOAD
LESSON PLAN AND EVALUATION**

NEGOTIATING WITH AN INSURANCE ADJUSTER

With

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And featuring

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Program description

There is law...there are facts...and then there are negotiating skills. Many times the size of your recovery depends on your ability to persuade an insurance adjuster to say "yes". This 1.5 credit CLE will show you everything you need to know.

I. Introduction

- **Kevin Riechelson, Esq.**

II. The Nature of Civil Practice

- **Can be a cut throat practice**
- **Can be collegial as well**
- **Dealing with big firms and money then there is a level of advocacy that is not always present**
 - **Depends on the case**

III. Negotiating on behalf of your client

- **Client has great expectations but attorney finds that case is not worth that amount**
- **At what point do you get your client involved in negotiating by discussing offers with client and advising of offers either way?**
- **Larger cases – go to Alternative Dispute Resolution**
- **Mediation – non-binding, neutral mediator supposed to bring both sides to a neutral, try to find common ground, often don't recommend a particular number**
 - **i.e. construction litigation – third party case against a general contractor – usually violations of OSHA, lack of fall protection – worker's comp lien is much higher and impediment to settlement because it is so high; sets floor of value of case because first dollar goes to worker's comp carrier; need worker's comp carrier as part of settlement negotiations and ask to reduce lien in order to get case settled**
 - **construction accident in DE, case filed in PA, lien of \$201K, liability was "iffy", agreement with comp carrier for binding arbitration, comp carrier said they would reduce lien to 1/3 of settlement value, incentive to comp carrier if questionable liability is that they could get \$0; must go into arbitration knowing what needs to be paid back; begin settlement negotiations with comp carrier before enter mediation**
- **Hypothetical: good liability, comp lien for \$600K, bad weather, strong case**
 - **Liability general contract would have usually have \$1M; larger company may have \$1M and then excess coverage more**

- **Begin negotiations with looking at damages (economic)**
- **Some jurisdictions do not allow you to introduce “collateral source” – money that is paid by another source (i.e. comp lien)**
- **Hire an economist who would put together numbers and say what lost wages, permanency award, and medicals (this would all be part of the comp lien but a way to get around those jurisdiction that would otherwise limit this type of evidence being part of the negotiation) – look at earnings (3-5 years tax returns, etc), what type of job could a person return to?**
- **Need vocational expert- can person work? Cannot work? Limited work? Use life tables to extend out potential income for life span**
- **For this hypothetical, person was 38 years old earning \$62K per year – if not returning to work \$1.8M lost wages**
- **Comp only entitled to be paid 2/3 – in NJ - \$450K comp lien (medical bills), plus out of pocket costs (i.e. childcare as a result of injuries, etc.)**
- **Non-economic damages – there is no formula – look at injury itself – past experience, etc.; look at age of person and limitations for life expectancy**
- **For hypothetical – lost use of legs – hire life care plan expert (nurse) – what it will cost to take care of person in condition like that – adapt home, automobile, etc.; need healthcare in house; etc.**
- **Non-economic – how can you let an adjuster understand client’s agony?**
 - **Defense attorney will assess**
 - **Look at how this will play to a jury, i.e. sympathetic witness**
- **Some advantages to trying to settle case from outset – but need to know how to value case from beginning**
- **Hypothetical – depositions done, \$10M policy, \$400K comp lien, \$1.8M economic losses – case may be worth around \$5M settlement**
- **To settle case may deal with adjuster or attorney depending on who is the insurance company – in hypothetical some insurance companies would give their**

adjusters a limit for settlement and then need to go through supervisors and loss committees depending on how high the claim may be

- **Send notice to defendant and it will be turned over to insurance company/broker, then insurance company will contact plaintiff's attorney will request medical package to assess case – sometimes will negotiate sometimes not – will assess liability – pre litigation**
- **In house counsel – distinction with outside counsel? Some outside counsel says that insurance company does all settlements in house, and vice versa**
- **File suit immediately?? Make sure have all necessary parties before statute runs; in NJ allowed John Doe defendants but have to adequately described them to preserve statute of limitations, but PA not allowed**
- **How to sell this to an insurance company?**
 - **ADR**
 - **Compile a package of all relevant information**
 - **Day in the life video?? – shouldn't need if attorney can communicate in words the injuries and situation; most adjusters will understand limitations of the injuries; best way to communicate injuries, etc., is from the witness stand by the plaintiff**
 - **Talk to comp carrier to see what their position will be – if payback is \$400K – may ask to take a reduced amount – tell them there are flaws in the case, and explain that in order to settle client has to be happy with the number – if not happy, then client may want to go to trial and comp company may lose out; half full v. half empty**
 - **Talk to insurance company (adjuster) and put best foot forward – explain away flaws in case, show why flaws are not important**
 - **Do negotiations in writing via settlement package, including photographs, statement of case, etc.; then by telephone negotiating back and forth**
 - **Message in negotiations is not to go to trial – in NJ, no bad faith, but in PA there is bad faith and the damages can be beyond the limits of the policy**

- **May have excess carrier coverage and excess carrier adjuster may help negotiations to limit excess carrier liability and force hand of primary carrier**
- **When there are multiple defendants then most likely not going to settle a case prior to litigation being filed – although most cases go to ADR**
- **Go after big fish only?? Afraid of empty chair problem**
- **Client ethical issues**
 - **Communicating with your client on negotiations – obligation to report any settlement offer to your client; must still convey it even if it is unreasonable; “wouldn’t recommend it” to the client; document offers and what you have communicated to your client along the way**
 - **Attorneys are not entirely objective relative to monetary issues since attorneys get fee from settlement**
 - **Tell clients that offer belongs to client not to attorney; the settlement is not for attorney; it is up to client to accept or reject but attorney can provide counsel but ultimate decision is client’s decision**
 - **Persuade clients to accept that attorney is providing best advice and advice should be followed**
 - **What happens when client wants to accept settlement that is completely inadequate? Counsel client and advise that if they are patient then would get more favorable result; can go back to attorney or adjuster and ask for drop dead offer to get rid of case right now; try to push through one more attempt to get better number**
 - **Difficult client with low settlement offer that the client wants to accept – not the usual situation; usually looking at client who wants a great deal of money but offers are lower but reasonable – unreasonable client expectation**
 - **Cannot advance clients money in anticipation of settlement – there are companies that do provide**

this type of financial arrangement (inflated interest rates) – do not get involved in business transactions with clients – have client get another attorney if want to be involved in business transactions with clients

- **Different approach for personal injury case??**
 - **Different coverages so different approach (maybe)**
 - **Not talking about layers and layers of coverage**
 - **Easier time to settle case**
 - **No liens involved**
- **Different process for more mundane cases?**
 - **Adjuster has more leeway to settle case**
 - **Depending on full threshold or not**
 - **Depending if plaintiff has surgery**
 - **Auto cases – people don't have high limits – possible over policy claims**
- **AAA Arbitration**
 - **Don't have to follow rules of evidence and civil procedure**
 - **Do what they feel is the right thing to do**
 - **Don't do disposition motions**
 - **Could be less expensive to settle than go through arbitration**
- **Binding arbitration?**
 - **Cuts down on costs, arbitrator knows law, shortened time period**
 - **One side with high number and one side with low number – one side feels they got burned**
- **Preference is mediation because mediator cannot force you to do anything you don't want to do – mediators do not have a number**
- **Many adjusters know it is a policy limits case but don't want to pay on that because they get "rated" by what they save the company – adjusters say "what do you want to save me on the policy"**
- **Rova Farms has no teeth in NJ – bad faith is not a slam dunk in NJ; not strong body of caselaw; no obligation to send Rova Farms letter; affirmative obligation on insurance company to protect the insured and pay policy limits – so no need for Rova Farms letter – just a routine letter – no impact for negotiations**

- **Longworth letter – ask for permission to accept the policy limits when there is another excess coverage; auto accident defendant has \$15K policy with \$100K UIM; to get \$15K need Longworth letter; UIM carrier wants to make sure you have exhausted remedies against defendant; could be excess policies that were not ferreted out during discovery – want to insure UIM coverage is protected; UIM would get credit for the amount obtained through policy**

IV. Tort Claims cases/settlements

- **Proposed change to the law that may have impact – Judge Sabatino talking about adopting statement 3rd for sidewalk residents – would be major change in law that would change tort claims**
 - **In PA, commercial business responsible for own sidewalks and municipalities are secondarily liable, same with residences – proposed NJ change would make the law similar to PA**
- **Hypothetical – client is a jogger; running down the street; trips over pipe in ground; badly hurt, broken leg; can't job anymore, torn ligaments;**
 - **First determine who pipe belongs to – hardest part**
 - **Do as much research as you can – must be right, in NJ only have 60 days to make determination**
 - **Best practice – sue everyone and see what pans out – send tort claims letters**
 - **Denial letter may say who is the owner of the pipe or help to narrow it down**
 - **NJ – can allow extension of tort claims if made it difficult to find proper defendant – must do by motion to extend**
- **Negotiating with governmental agencies**
- **Some governments have TPA (third party administrator) – an organization that processes insurance claims or certain aspects of employee benefit plans for a separate entity.**
 - **Handles claims for gov't agency**
 - **Handle negotiations as you would with insurance company**
- **All settlements must be approved by city council - dealing with politics and money issues**

- **Always better off negotiating than going to litigation/trial – avoid bureaucracy**
- **Certain things that municipalities are immune for as sovereigns**
- **Harder case under tort claim act – another layer to get through**
- **Have to know if minor case not going to want to bother with the case because of all the issues involved**
- **Jury pool is coming from area – so jury will consider how the damages are going to effect them personally**
- **Negotiations –**
 - **Look at valuation based on jurisdiction**
 - **Be patient**
 - **All depends on who you are negotiating with**
 - **Possible that municipality will drag case out for a long time**
 - **Township may be in more position to purchase insurance and be represented by counsel – no big enough to handle exposure**

V. Insurance Carriers

- **Carriers going out of business during settlement negotiations**
- **Depends on what insurance companies do with the premiums**
- **Insurance companies can lose on investments and therefore go under**
- **Self insured company – clients have to be more reasonable because smaller company and more exposure can lead carrier into bankruptcy**

VI. Unsatisfied claim and judgment fund

- **Hard to get payments from fund**
- **If you have a client that does not own a car and are struck by a car, entitled to \$250K of PIP coverage**
- **\$15K payment for non-economic damages – much harder – client did not own a car – still subject to threshold against the fund**
- **Most you can recover is \$15K; most attorney can recover is 1/3, or \$5K**
- **Aggressive AGs – discourages attorneys from taking these types of cases**
- **Case by case basis and look at injuries for negotiations**

- **You can try the case and hopefully get an excess verdict – but that can be appealed**

VII. Closing remarks and information

- **Some adjusters are never going to get authorization to settle and you are going to have to try the case – need to know which insurance carriers work this way**
- **Learn what you are doing – need mentors, go to court, watch mentors**
- **No right or wrong to value of a case when negotiating – gut and experience**
- **Try to come up with value of a case and then talk to a more experienced attorney and talk about facts of the case – round table cases**
- **Recognize where adversary is coming from in negotiations**
- **Don't take anything personally in negotiations**
- **Be persistent**
- **Be careful what you are saying in negotiations – “I would recommend...” – protect yourself just in case client does not want to take offer**
- **Ask adjuster to send something memorializing settlement**
- **Worker's comp liens – get letter that says what they will take on their lien**
- **Send a letter to the adjuster to confirm conversation – create paper trail and there will be no question**
- **Money discussion is different with adjuster than with client because of expenses, etc. that reduce client's final settlement number (what the client actually gets)**
- **Client follow up letter breaking down final numbers**
- **Don't want client to be surprised**
- **Be persuasive**