Ten ways to settle your case quickly and reasonably

A defense attorney suggests that your client may benefit if you cooperate with defense counsel

By Debra Bogaards

1. Help the defense attorney with her first report to the carrier

The claim representative for every insurance carrier sends the claims file to its defense attorney, perhaps preceded by a phone call to let the defense attorney know the file is coming. Some carriers send the file without any cover letter, while others send the file with a brief summary.

The defense attorney reviews the file, summarizing any medical records and bills. The report for the carrier is done in a standard format: Statement of the Facts (description of the automobile accident, fire loss, etc.); Liability (police officer's conclusion as well as each party's version); Injuries, Damages (medical specials, wage loss, property damage and other); Evaluation and Discovery Plan with Budget.

The discovery plan includes, but is not limited to, the initial client meeting, serve form interrogatories, serve request to produce documents, subpoena medical, employment and worker's compensation records, and take plaintiff's deposition. Finally, the defense counsel usually calls the insured, and YOU, before completing the report. Then, the claim representative and defense attorney have a telephone conference to discuss the case, the discovery plan and to confirm the budget.

So, in the very beginning, the carrier asks the defense counsel to help him set reserves, and to determine what else is needed before the case is ready to be evaluated and settled. When defense counsel makes that first call to you, please take the time to pull your file and provide her with an understanding of the nature and extent of plaintiff's injuries (names of health-care providers, amount of medical specials, wage loss information), as well as a settlement demand.

Why should you volunteer such information? First, so defense counsel can subpoena records immediately. Otherwise, defense counsel has to wait at least 30 days to serve and then receive your responses to interrogatories. Then, defense counsel can send out subpoenas, and wait another 30 days for the records. That means your client's deposition is further delayed, since defense counsel needs to review the records to prepare for the deposition. Second, the carrier may decide certain discovery may not be needed, and wait for documentation on an informal basis so that defense counsel can be given settlement authority to resolve this case.

From the defense counsel's view, plaintiff's case has a certain value, based on his or her injuries, so there really is no need to wait, particularly in the majority of cases — when the complaint is filed on the eve of the running of the statue of limitations, and all medical treatment has been completed, and injuries resolved. In one case that comes to mind, the plaintiff had ugly scars on his neck and chest. To get a higher settlement offer, the carrier asked plaintiff's counsel to obtain a plastic surgeon's report as to the need and cost of a revision surgery. That report took counsel about six months to obtain. Finally, once the report was submitted, the carrier settled the case.

2. Provide a reasonable and early settlement demand

That's the challenge for *you*, to determine when and how much to ask for in settlement. I prefer to put your settlement demand in my initial report. Sometimes, my initial evaluation is higher than the claim representative's evaluation, so knowing your settlement demand early on means that I may be able to get your case settled early on.

Many of you believe that the defense attorney wants to complete discovery before entering into settlement, since we get paid by the hour. The defense attorney gets cases from the carrier due to a long-standing relationship as well as results, so it's nice to be able to show the carrier that the defense attorney can close a file relatively fast. In fact, I report my firm's settlements that occur within the first 90 days for one carrier who does keep track of our firm's success in doing so.

3. Assist the defense attorney with your view of liability

In one memorable case, on my initial telephone call to the plaintiff's counsel, he asked me to meet him for coffee to discuss liability. I agreed. The claim representative had found 100 percent liability against the motorcyclist for speeding in the curb lane. Plaintiff's counsel told me the subject intersection was very unusual, and asked me to view the scene before submitting my initial evaluation to the carrier. I agreed. Ten minutes later, after viewing the scene,

I called the carrier, and advised that liability was 80-100 percent adverse to its insured. Then, the only discovery was focused on evaluating damages.

4. Be friendly, especially during a long deposition of plaintiff

There tends to be a lack of civility and professionalism on both sides in litigation. When the defense counsel takes your client's deposition, try to remain professional, and refrain from personal attacks on the defense attorney. Naturally, making objections to certain questions is expected. But you can do that without anger, raising your voice, or making condescending speaking objections.

There also seems to be an emerging trend to call the deposition at the two hour mark – either due to the plaintiff attorney's alleged conflict with another appointment, or the plaintiff's unspecified health condition. I've even heard of needing to pick up kids – whether plaintiff's or plaintiff counsel's kids. Since the deposition is noticed for the full day, please let your client know that both of you will need to block out the full day so the deposition may be completed. When the deposition ends early, defense counsel is already in her office and can move on to other work. However, defense counsel is unable to complete her summary and report to the carrier, so she cannot get the case ready for settlement when the deposition abruptly ends for the day because plaintiff or plaintiff counsel has to leave early.

5. The defense physical IME

The defense counsel gets to select the doctor to perform the IME. Often, I hear my friends on the plaintiff's side lament over the doctor chosen by defense counsel because said doctor is perceived to be "overused" or a "defense whore." I've often wondered why my friends get so upset. Those overused doctors are usually easily attacked at deposition and trial, particularly with the binders of old deposition transcripts that many of you have created.

From my view, both sides have doctors who prepare so-called boiler plate reports. There is one plaintiff's treating doctor who invariably finds thoracic outlet – a rare diagnosis – syndrome in every plaintiff with a questionable mechanism of injury. There is another doctor who runs up medical specials by giving numerous injections at the surgicenter the doctor owns. I abhor the use of such doctors on either side.

My preferred practice is to use active doctors, who have a clinical practice, still do surgery, and provide a fair evaluation. Due to defense counsel's relationship with the IME doctor, when said doctor concludes your plaintiff has a catastrophic injury due to the accident, then my job is easier when I request the million dollar policy limits. The carrier wants the doctor's honest opinion, and the carrier is more apt to trust the opinion of a doctor with whom the carrier has some experience.

Incidentally, defense counsel is always looking for new local doctors to do IME's. However, it's hard to find young surgeons who want to do IME's, as they would rather do more surgeries. It's also difficult to find good surgeons who like and are good at responding to your skilled cross-examination. My current search, for example, for a female surgeon who would like to do IMES has been challenging.

6. Stipulate to the usual emotional distress flowing from plaintiff's injuries

The biggest push back comes when the defense attorney seeks a mental IME. To avoid subjecting the plaintiff to a mental IME, consider stipulating to plaintiff claiming the usual emotional distress flowing from his or her physical injuries. By doing so, you may also have to stipulate that plaintiff won't have any expert such as a therapist, M.F.T., L.C.S.W., or psychologist testify at trial.

Assuming plaintiff will not enter into such a stipulation, then cooperate with the mental IME. When a catastrophic event causes the plaintiff to experience depression, Post-Traumatic Stress Disorder or closed head injury, then you have a significant claim for mental injuries. The psychiatric evaluation and neuropsychological testing will assist the defense attorney in evaluating plaintiff's mental injuries.

An emerging trend – okay, two cases this month – is for plaintiff to claim his post-concussive syndrome results in physical injuries, and therefore, plaintiff refuses to submit to a mental IME. Plaintiff's symptoms include dizziness, nausea, double vision, loss of balance, anxiety, lack of concentration and memory loss. From the defense perspective, post-concussive syndrome is a mental injury that most likely will be included in the DSM IV TR in the near future. Complicating my two similar cases, both plaintiffs are bipolar, so the mental IME is important to determine whether the symptoms are related to plaintiff's bipolar condition, side effects of medication for plaintiff's bipolar condition, and/or the accident.

Why fight the mental IME? With the example given above – the bipolar plaintiff with post-concussive syndrome – the IME psychiatrist may determine the plaintiff has been taking bipolar medication for several years, so the new symptoms are not side effects of the medication. Moreover, bipolar plaintiffs may be more apt to have a somatoform disorder. If the accident acted as a catalyst, then defendant may be responsible for plaintiff's somataform disorder.

7. Settle the case before mediation

Settlement negotiations over the phone, or, better yet, lunch, rarely happen anymore. When is the last time that you invited defense counsel to lunch? After you finish reading this article, think of one case, and call the defense counsel to invite him or her to lunch. Try it, you never know.

Before initiating settlement negotiations, send defense counsel an old fashion settlement demand package. Usually, the settlement demand letter is written with the same detail as your binding arbitration brief. In other words, include deposition page-line citations, and detailed argument. Definitely include a list of medical providers, dates of treatment, and the amount of bills. Address past and

future medical treatment as well as past and future wage loss. Attach exhibits.

Follow up with a phone call to defense counsel, either to initiate meaningful settlement negotiations or to invite her to lunch. Ask the defense counsel what else she needs before obtaining further settlement authority: Is liability being disputed? If so, does defense counsel have an accident reconstruction consultant on board? Are there any witness depositions that need to go forward? Or, is causation of injury being disputed?

Often, plaintiff's counsel and defense counsel are busy with other cases, and meaningful settlement discussions wait until a mediation is ordered by the court. Several of my defense counsel colleagues who manage law firms all responded to my email for ideas for this article with the same tip: successful plaintiffs' attorneys settle cases early, rather than waiting six months and getting closer to trial. Settlement values rarely increase with discovery (unless you take phenomenal PMK or videotaped expert depositions). Simply, the same settlement money may be available much earlier.

8. Settle plaintiff's case at mediation

I strongly suggest a pre-mediation telephone call with all counsel and the mediator about one week ahead of time. Will both plaintiff and the claim representative be present (in person)? Does defense counsel have everything she needs to obtain settlement authority? Has defense counsel received the requested settlement authority? Is a general caucus at the outset of the mediation desired?

Timing, timing, timing. With one of my carriers, I have to get all information and documentation, along with an evaluation in a report form, to the carrier at least six weeks before the mediation. That gives the claim representative time to take the defense counsel's report, distill it into their insurance company's report format, and send the report up the line.

The team manager and his boss, the divisional manager, may send back questions for the claim representative to ask of the defense counsel. In turn, the defense counsel may need to call the IME doctor or accident reconstruction expert with those same questions. So the process to obtain settlement authority, particularly in the six figures, can take an enormous amount of time.

In the event that defense counsel needs more time to obtain the carrier's settlement authority, then the mediation should be continued.

9. Pare down plaintiff's expert list

A few cases will head to trial. In that event, both counsel should keep the process professional. Often, defense counsel gets plaintiff's disclosure of experts, which has 10 to 20 treaters listed as non-retained experts. While we understand that our depositions of plaintiff's non-retained experts may assist you in determining which one or two treaters to call at trial, we would prefer that you meet with said experts in advance of making your disclosure, and serve a pared down list.

Does making it expensive for the defense, by listing 10 to 20 treaters, mean the defense will pay you more in settlement? No. Carriers look at the value of the case, not the defense pre-trial budget. That's why you can scratch your head at a $25,000 settlement demand and a $72,000 pre-trial budget.

Why make the scheduling of expert depositions professional and easy for the defense? Simply because you may need a return favor during the expert discovery *and* settlement is always possible.

10. Be nice to the defense

This should be both the first and last tip. Defense attorneys and claim representatives usually stay in the business a long time and have selective memories. The claim log notes contain reference to difficult counsel who reduce the vulnerable new claim representative to tears by yelling (which is never necessary) or being rude. The defense counsel and its staff may have similar experiences.

The better and more successful plaintiff's counsel – and there are many of you – are both friendly and good listeners. You establish rapport with the claim representative at the beginning of the case, talking to her about a recent vacation, movie, the Giants or the case. You do the same with defense counsel, and her staff. You make doing business with you a pleasure whenever possible.

Besides making the practice of law more enjoyable, you will be even more successful as a plaintiff's counsel. Your settlements will be earlier, higher and more rewarding.

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