2001 USARCS CLAIMS TRAINING COURSE
Tort Claims Seminar Workshop
Negotiation

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I. INTRODUCTION

II. REFERENCES

A. Army Regulation (AR) 27-20, Claims.

B. Department of the Army Pamphlet (DA PAM) 27-162, Claims.

C. Federal Tort Claims Handbook 2001.

D. Getting to Yes, Roger Fisher, William Ury, and Bruce Patton, Second Edition (Penguin Books, 1991).

III. SETTLEMENT AUTHORITY

A. Settlement authority is that authority required to approve or deny a claim or make a final offer subject to any limitation imposed by AR 27-20 (figure 2-47, excerpt from 10 U.S.C. § 2731). Determining the proper authority empowered to take final action (denial, approval, or final offer) depends on the claims statute involved. You must know and understand your authority before taking final action. Some of these statutes are:

(1) The Federal Tort Claims Act (FTCA), AR 27-20, Chapter 4.

(2) The Military Claims Act (MCA), AR 27-20, Chapter 3.

(3) The Non-Scope Claims Act, AR 27-20, Chapter 5.

(4) The Foreign Claims Act (FCA), AR 27-20, Chapter 10.

(5) The National Guard Claims Act (NGCA), AR 27-10, Chapter 6.

(6) Non-Appropriated Fund Claims, AR 27-20, Chapter 12.

(a) Non-Appropriated Fund Scope Claims

(b) Non-Appropriated Fund Non-Scope Claims

(c) Family Care Providers

(d) Use of Non-Appropriated Fund Recreational Equipment

(6) Maritime Claims, AR 27-20, Chapter 8.

IV. USARCS SETTLEMENT POLICY

A. Pay meritorious claims, promptly and fairly at the lowest level. The expeditious investigation and settlement of claims is essential to successfully fulfilling the Army's responsibilities under the claims statutes implemented by AR 27-20.

B. Pro se claimants - It is not our goal to achieve low settlements at the expense of fairness. Always deal with fairly and make an appropriate settlement offer.

V. EVALUATING THE CLAIM PRIOR TO NEGOTIATION

A. Investigation.

(1) You must take an active role in the investigation of claims and this may include interviewing witnesses at the scene of the incident, taking photographs, and obtaining evidence from various agencies on and off the installation.

(2) Cooperative investigative environment. Every effort should be made to create a cooperative environment that engenders the free exchange of information and evidence. The goal of obtaining sufficient information to make an objective and fair analysis should be paramount. **Personal contact with claimants or their representatives both during investigation and before adjudication is essential** (see AR 27-20, Chapter 1-19 for guidance concerning disclosure of information and assistance).

B. Evaluating the Liability Case.

(1) State Tort. Under the FTCA, liability must rest on the existence of a tort cognizable under State law. A finding of State tort liability requires the litigating attorney to prove the elements of duty, breach of duty, causation, and damages as interpreted by Federal law.

(2) Threshold exclusions. AR 27-20, paragraph 2-39.

(3) Threshold issues.

(a) Statute of limitations. Don't jump to conclusions but do some legal research, as Federal judges tend to make generous legal conclusions in the favor of the claimant.

(b) U.S. employee requirement. This does not include a contractor of the United States. Apply Federal case law for interpretation.

(c) Scope of employment.

(4) Identify strength and weaknesses. A common failing in negotiating settlements of claims is neglecting to consider the impact of liability issues. AR 27-20, paragraphs 2-47 -2-51 and DA PAM 27-162, paragraphs 2-84-2-88 and FTCA Handbook, Section II, paragraph G.

(a) Identification of negligent third parties who are not federal employees, such as: health care providers; designers and manufacturers of defective products; maintenance contractors; operators of privately owned vehicles; designers and builders of highways; private homeowners; dram shop or social host circumstances.

(b) Negligence by the claimant. There are many examples such as reckless or careless driving, conflicting stories from witnesses to include police and claimant; claimant was trespassing on the installation, failure to use a seatbelt, footwear that contributed to fall, and a noncompliant patient/parents who do not follow medical advice.

(c) Contributory or comparative negligence. You must know the standard for the State where the incident occurred and how this standard is interpreted by judges both State and Federal.

(d) Unclear negligence by Federal employee. There may be a scope of employment issue, contradictory standards of practice, documents or statements that are inconsistent with claimant's recollection of events, poor credibility of witnesses, or admissions against interest by the claimant.

(e) Expert Opinions. Claimant's experts whose credentials or whose methods can be questioned, or whether scientific principles they applied to evidence are also questionable (are conclusions and means justified).

(f) Medical documentation. Doubt is cast on the nature and extent of an injury or damage, its proximate cause, and whether it may be preexisting.

(g) Mitigation evidence. This evidence can cut both ways. Make sure you obtain this type of evidence during the investigation and interviews.

(5) Strategy to use Liability Issues. The key to any negotiation is communication and deciding what and when to communicate to claimant's counsel or the pro se claimant. Keep these principles in mind:

(a) As soon as you have reliable evidence of defenses or liability issues, you should communicate them to counsel or pro se client. **Do this telephonically and**

not just in writing. You should remind counsel at every opportunity in order to make your intentions clear concerning such defenses in your evaluation and negotiations and to afford them opportunity for rebuttal in advance of negotiations.

(b) Upon request, release what evidence is discoverable, otherwise, volunteer evidence if it is to the Government's advantage. Contact your AAO if you have questions about the release of evidence.

(c) **Never admit liability**. Only the Department of Justice is authorized to admit liability. More importantly, so long as liability is an issue, it encourages the claimant's cooperation because it forces an ongoing assessment of the risk of litigation.

(d) Risk of litigation. There will be times when you need to be more forthcoming with certain information, either to move negotiations forward such as providing interviews of Government employees or agreeing to an independent medical evaluation, conceding weakness in the Government's defense, or showing willingness to move on to damages.

(e) Claimant's burden to document liability. The claimant is not required to document liability in the administrative process. It is your job to assess liability and educate the claimant. Therefore, the claims attorney must weigh the risk that documenting liability will further educate the claimant about the value of the claim against the benefits of discovering what they know, what they do not know, and the quality of their evidence. In the claim where Government liability is clear, the risk should be viewed as too great. In the claim where Government liability is arguable, this is a strategy where the benefits may warrant the risk.

C. Evaluating Damages.

(1) State Law.

(a) Special damages. These include: lost wages, value of lost services, medical expense, and other damages that are directly related and that are non-speculative damages.

(1) Scrutinize small property damage claims for Government liability and compromise accordingly. Make sure repair costs and parts to be repaired are justified. If in doubt, contact the dealer for that particular vehicle. Rental car costs may be paid but must be reasonable and based on length of time actually needed to repair or to replace.

(2) Scrutinize medical bills and records to determine whether the care provided was reasonable and necessary. The fact that an insurer paid a certain amount to its insured does not govern the extent of the Army's liability (this includes workers' compensation claims).

(3) In determining damages, USARCS does not include medical bills that were paid by their insurance companies. The amount of medical care not covered is a consideration when settling the claims. Claimants are not automatically entitled to those bills paid by insurance companies. Additionally, CHAMPUS, TRICARE, or Medicare payments are excluded from payment under the collateral source rule.

(b) General Damages. These are not only difficult to estimate but they are also the award component subject to fluctuation in amount.

(1) Calculation. **Do not merely multiply the specials by three times to arrive at your figure for general damages. Further, never tell the attorney/claimant that is how you are calculating damages.** Review medical care, numbers of surgeries, any physical impairment ratings, missed work and other factors to determine the severity of the injury claimed and also research State law for similar cases.

(2) Department of Justice. In a case involving mostly general damages, Department of Justice expects a discount for settlement in the administrative phase. In a serious case such as a brain damaged baby, by regulation general damages are capped at $500,000 for the MCA, NGCA, and FCA claims. General damages under the FTCA must be scaled accordingly. AR 27-20, paragraph 3-5a(2)(h) and DA PAM 27-162, paragraph 2-74.

(3) Use information obtained from claimant's background and family situation to try and match the actual needs. After deducting attorney fees, costs, and payment of medical bills as well as out of pocket expenses, what do you intend to put in claimant's pocket?

VI. DEVELOPING A NEGOTIATING STRATEGY AND NEGOTIATING THE CLAIM

A. To settle or litigate. This is often the most important decision a lawyer and client make. At times the choice is easy, as where pressing financial needs force the client to settle. More often the choice is difficult, requiring a weighing of immediate financial needs, future financial possibilities, the costs of litigation, the likelihood of victory, the probable size of a court award, and other concerns.

B. Evaluating the Claim. As stated previously, USARCS' goal is to reach a fair and just settlement in the administrative claims process thus avoiding costly litigation and saving the Government money, time and resources. Determining the value of any settlement is complex and many attorneys, on both sides, would rather "wing it" than analyze the situation. Most cases are complicated and filled with uncertainties. The value of the claim depends upon many factors. You cannot simply weigh so many unknowns unless the problem is broken down into its component parts, and each part is then examined in turn.

C. Formulating Your First Offer.

(1) Do your homework. Knowing the strengths and weaknesses of your case means a better settlement for the Government.

(2) Start Low. DOJ's informal policy is to start low to approach a fair settlement. It is usually not too difficult to "start low" since most claimants file for amounts much higher than what they deserve or reasonably expect.

(3) Know your opponent if possible. Knowing the other attorney's reputation and background, including his or her ability to try cases, assists in determining the negotiation methods. For example, when attorneys are expected to split their fees, the likelihood of executing an administrative settlement is increased since the referring attorney's fee will be reduced if there is a trial. Remember, USARCS can do a better job in the administrative settlement phase than the Assistant U.S. Attorney or Litigation Division in the event of litigation as we possess an excellent grasp of the facts and damages and have more time to negotiate a settlement within our authority.

(4) Refuse to negotiate with a paralegal or junior attorney. Deal only with the attorney empowered to make the decision.

(5) Make sure that the attorney has obtained authority to settle from the client prior to negotiations and secure an understanding or promise that the attorney will pass any offer made to the client in accordance with ethic requirements.

(6) Depending on the size of the claim(s), prior to negotiations, coordinate with your AAO to ensure you have appropriate authority to settle the claim.

(7) Value of the Claim. Establish an expected range. The most valuable strategic tool in negotiation is a clear understanding of a claim's value. You must assess the least and most you are willing to offer the claimant as well as what you believe the claimant will accept. Conversely, the claimant is also assessing what the least he/she will accept and what he/she believes you will offer.

D. Initial Offer.

(1) Successful negotiation in almost all cases is accomplished through dialogue and not letter writing. You may ask the attorney for an initial offer but if none is forthcoming or extremely high make a reasonable, but low initial offer.

(2) If the attorney will not name a reasonable figure, ask the attorney to identify the key elements of damages and discuss these on a point-by-point basis. You will find this very successful as you will know your case much more thoroughly than opposing counsel.

(3) Try to start a dialogue by identifying the disputed points. Do not mention "ballpark" figures unless you intend to make that an offer. Many attorneys will take that to mean you will settle for your jurisdictional limits or more.

(4) Try and understand what the claimant needs. The claimant may have pressing financial needs such as lost wages and debt incurred as a result of the incident. What the claimant **needs** and **wants** are two different things but you will be a more successful negotiator if you understand these dynamics. Your first offer will most likely be somewhere in between.

(5) Low Ball vs. Low First Offer. Do not make "low ball" offers. You will most likely lose credibility with the claimant's attorney and the negotiation will be more difficult. Be reasonable and tell them that from the outset.

E. Counteroffers.

(1) **Do not bid against yourself.** If attorney will not come down do not continue to bid or raise your offer in the absence of a reasonable counteroffer.

(2) Is the counteroffer reasonable? If not, a firm response is required with a request for a more reasonable counteroffer.

(3) When the counteroffer is not reasonable, request claimant to break down the offer and specify the amounts for special and general damages. You may have to educate the attorney concerning the law or other requirements under the claims statute involved.

(4) Do you need to confer with USARCS AAO? Don't forget your settlement authority on a single incident or multiple claims from a single incident as well as subrogation claims.

(5) Separate the people from the problem and always maintain self-control. When the attorney fails to negotiate in a fair or even ethical manner, bring them into the open. Refuse to negotiate while the irritating tactics continue.

(6) Educate, Educate, Educate. Never underestimate the value of educating opposing counsel concerning the value of the claim and to open the road to cooperation. A strong Government position will be valuable whether the claim is settled in the administrative process or is litigated.

(7) Be Patient. **Remember, they fear trial in Federal court and in the end, they are likely to collapse.**

F. Final Offer.

(1) Not all cases settle. If an impasse is reached, do not immediately make a final offer. Wait until the attorney has had time to reflect. Remember, you do not have the authority to terminate negotiations and make final offers without explicit instructions from the USARCS AAO if the final offer exceeds your denial authority.

(2) Final Offer Letter. A written offer's only legitimate purpose during negotiations is to provide the opposing attorney the means to convince the client that the client's expectations are unreasonable. Make sure to include legal arguments for the basis of your offer and not just a dollar figure.

G. Settlement Agreements with Unrepresented Claimants. DA PAM 27-162, paragraph 2-88.

(1) Educate the claimant. Fully explain the administrative claims process so that you foster an atmosphere of trust and confidence. DA PAM 27-162, paragraph 2-88(a).

(2) Always prepare a memorandum for record after conversations with pro se claimants. You may also wish to followup any conversations with a memorandum to the claimant outlining what you discussed.

(3) Claims personnel who are not attorneys must disclose their status to the claimant.

(4) Claims personnel should make clear to the claimant that they represent the United States and not the claimant. You may wish to suggest to the claimant that any offer/settlement should be reviewed with an attorney on an hourly fee basis as opposed to a contingency basis.

(5) Do not "low ball" pro se claimants. Your first offer should be within a reasonable range of what you believe would be your final offer. Do not engage in protracted settlement negotiations as this may create the impression you are not negotiating fairly.

(6) Concerning property damage claims, insist on documentation. Without documentation, do not increase the offer just to get rid of the claim.

(7) If the claimant refuses to enter into meaningful negotiations or to hire an attorney in an FTCA case in which the six-month period has expired, inform the claimant that suit may be brought, as settlement is not possible. Make a final offer in the appropriate case as described in DA PAM 27-162, paragraph 2-94.

VII. NEGOTIATING SMALL CLAIMS

A. Small Claims Procedure. Small claims procedures should be used as much as possible. The Army's small claims procedures are consistent with the industry practice of

settling minor tort claims on the spot. Using these procedures also avoids escalation of damages since delays in settlement may cause claimants to grow increasingly dissatisfied and to amend their claims, (e.g. including personal injury) seeking greater compensation. All claims settlements reflect the judgment and discretion of the Claims Attorney or Claims Judge Advocate who settles the claim. These procedures are simply a means of reducing paperwork and legwork necessary to document a claims settlement decision.

B. On Post Traffic Accident. Most small claims are traffic accidents on post and fall under the MCA (10 U.SC. 2733 and AR 27-20, Chapter 3). The following are suggestions concerning the settlement of small claims:

(1) **Leave your office and go to the scene of the accident with the claimants.** A good investigator or other claims personnel in your office can accomplish this investigation. Interview the claimants at the scene of traffic accidents and premises liability claims when possible.

(2) Settle the claim on the spot if possible. Minor damage does not require a written estimate. Claims personnel may settle claims within the Claims Attorney settlement authority.

(3) Formal scope of duty statements are not required. You may document by completing a memorandum for record after conversations with supervisors.

(4) **Take photographs as soon as possible with the digital camera.** Take at least 8 pictures of each vehicle involved (all angles). This will prevent the Government from paying for vehicle repairs that were not part of the claimed incident. Take photographs of the accident scene as required. In the event of a dispute you will have excellent documentation on hand when settling the claim.

(5) For more major damage, once the claimant has obtained all necessary documents and reports the claim, it should be paid as soon as possible.

(6) Subrogation claims may not be paid under the Military Claims Act.

C. Small Claims Processing Times. Your goal should be to resolve small claims under $2,500 within 30-60 days and small claims under $25,000 with a year from the date the claim was filed. You may have to request additional resources from your SJA/DSJA to accomplish this mission such as a non-commissioned offer on an ad hoc basis to investigate small claims, but this will allow the Claims Attorney/Judge Advocate to spend valuable time on larger claims that require an attorney's involvement.

VIII. CONCLUSION