1999 U.S. Army Claims Service Claims Training Course

NEGOTIATING HIGH VALUE CLAIMS

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I. REFERENCES.

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

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

C. G. Williams, Legal Negotiations and Settlement (1983).

D. G. Bellow and B. Moulton, Negotiation (1981).

E. R. Bastress and J. Harbough, Interviewing, Counseling and Negotiation (1990).

F. T. Schelling, The Strategy of Conflict (1981).

II. BEGINNINGS.

A. A successful negotiation is a dialogue in which you give to get, and it exists not just at the end but rather runs through the life of the case, manifested as a series of trust-inducing acts.

B. Knowledge is key. Ideally, you should know more about the case than the claimant's attorney, weaknesses as well as strengths. As often as the facts dictate the outcome, they can also create the opportunities for a negotiated settlement.

C. Every negotiation begins with the first contact with the claimant or the attorney, at which time they begin to present the case to you, and vice versa, provided you think it is the right time to do so.

D. While your knowledge of the case is your ultimate tool, the next best tool is controlling what you want your adversary to know and do, especially if there is something specific you want them to know or learn.

III. COLLABORATION.

A. Cooperative settlements are the best settlements because they usually put you in control at the outset, with the advantage being yours at the end because of the other side's time investment.

B. This means reciprocal but unequal risks, such as keeping the opposing attorney informed and putting continual, time-investing responsibility on him or her.

C. Follow the "contac" principle of information release - safe, sealed and controlled.

D. To the claimant or the attorney, the present benefit of a negotiated settlement should outweigh the value of the litigation expectations and the future time lost from litigation.

IV. THE CRUCIAL ADVANTAGES EVERYONE SEEKS.

A. Identify the needs and problems.

B. Make their deadlines work for you.

C. Convey the sense of equal authority.

V. THE SUCCESSFUL NEGOTIATION.

A. Never admit liability. Only the Department of Justice has the authority to do so. Admission of liability will make settlement difficult or impossible, and it is unnecessary. Since most settlements are a compromise, reflecting strengths and weaknesses of all issues of liability and damages, admission of liability removes all incentive for the claimant to compromise and the claimant then expects a full value settlement. Not admitting liability encourages the cooperation of the claimant's attorney in investigating and settling the claim.

B. In an obvious liability case, shift the focus to damages.

C. It is normally counterproductive in a clear liability case to require the claimant to furnish liability opinions.

D. Face to face negotiations are preferred since they normally lead to quicker and better settlements. Written offers should be avoided unless you feel your offers are not being communicated.

E. When the claimant has a close relationship with a military health care provider, keeping the provider advised in a general way of the progress in negotiations could be beneficial.

F. The Army's settlement procedure should always be explained to the claimant's attorney before negotiations begin. Settlements beyond the field's authority are tentative, subject to approval by either USARCS or the Department of Justice, depending on the expected amount of the settlement. Otherwise, a settlement negotiated beyond one's authority is void, creating embarrassment and probably assuring litigation.

G. Poor negotiating skills or the inability to recognize a serious offer will invariably lead to litigation or a bad settlement.

H. The attorney's and the claimant's interests may conflict where the case has been "overlawyered" or overvalued.

I. Serious, successful negotiations require planning by studying the case and choosing the negotiating strategy:

1. Knowing the case provides a distinct psychological advantage and enables one to capitalize on the claimant's ignorance or lack of preparation.

a. Be attentive to the issues and defenses in the claim, as well as the nature and relationship of the parties, especially of the claimants to the military and the health care providers.

b. The claimant's and attorney's interests, needs, risk preferences, perceptions of strengths and weaknesses, and desire to settle should be known before negotiations begin.

c. Real and perceived issues and areas of agreement and dispute should be resolved.

d. The relationship between the government's attorney and the claimant's attorney should promote, not hinder, a mutually voluntary process, during which each assesses the other's skills.

e. As negotiations progress, be attentive to the claimant's needs and the relative importance of them.

2. There are two strategies (adversarial versus problem solving) and two styles (competitive versus cooperative).

a. Before formally beginning the negotiations, you should have assessed what your first offer will be, your fall back position, the claimant's evaluation, and what, if any, final offer should be made.

b. You should weigh whether to use an adversarial or cooperative negotiating style, given that you are attempting to settle an administrative claim, it is a voluntary process, negotiations are not necessarily a predicate to litigation, and one style may more likely succeed.

c. Not all adversarial attorneys are competitive; one can be adversarial and cooperative.

d. Regardless of strategy or style, the key is to be a knowledgeable problem solver.

e. Use principle and precedent.

f. Good preparation includes the ability and willingness to be flexible.

g. Often a structured settlement is a desirable, perhaps the only, way to settle a case. Consider the role you want your broker to play in the negotiations, but overall that of a neutral facilitator is best.

h. Negotiate the solution in stages, to its inevitable outcome, before ever talking about money.

i. The first offer should leave maneuvering room.

j. Your offer should invoke the right balance of substance and concern for what both sides are attempting to resolve in order to draw out the other side.

k. If the claimant's attorney demands you make the first offer, try to turn it to your advantage by emphasizing your case's strong points.

l. Be willing to acknowledge your case's weaknesses.

m. Always be professional, tolerant and firm.

n. Be creative about problem solving, either for your case or as a substitute for the claimant's attorney.

o. Differences will narrow with the exchange of proposals, and the number of proposals and counter-proposals will vary in each case.

p. The bottom line means achieving a certain kind of result.