a Window of Opportunity

how new negotiation methods can save money and your sanity

by Jim Golden

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Overworked, busy putting out fire after fire, I realized several years ago that my job as general counsel of a public trucking company was not what I expected. Rather than being more slow-paced and quiet than my previous law firm work, my job was making it difficult for me to take adequate time off with my family. Perhaps not surprisingly, the same vacuum that sucks a significant percentage of the US gross domestic product every year was sucking my time — the litigation vacuum.

My company's trucks traveled more than a million miles a day, and I found that numerous catastrophic accident cases, in some of which my company clearly deserved the blame, landed on my desk every year. Each one presented me with serious issues. The large sums paid in outside legal fees and settlements for these claims amounted to a substantial percentage of my company's total expenditures. The process of formal discovery drained the life out of my legal department and took valuable time from key executives. We were often embroiled in the technical aspects of discovery. I was so busy that I often became reactive, putting out fires and dealing with crises — instead of proactively taking initiative to implement more effective means of handling the legal affairs of our company. I was doing the urgent instead of the truly important.

Meanwhile, the lack of contact with grieving families of people killed in accidents frustrated me. In litigation involving other companies, I saw families whose breadwinners had been seriously injured or killed suffer secondary harms (such as home foreclosure, or cars lost) while waiting years for the litigation to come to a conclusion. I did not want that to happen on my watch.

This made me think: What if we could settle cases even before the process of formal discovery started? We could save vast amounts of time and money, as well as reduce the enormous emotional toll on grieving families.

I decided to experiment with a more compassionate approach in those cases where my company was clearly liable and later in some cases where liability was questionable. Some people discouraged me — the other side will perceive you as weak, they said. But I thought I could see a window of opportunity that had been missed — a window that only opens early in the litigation process.

The window I found opens before a suit is even filed. It has saved many millions of dollars for my company and other companies that I represent as outside "negotiation counsel," and has rewarded injured families with a higher percentage of the settlement amount paid by the company than they would normally receive.

But the window I found is not limited to me, or to the catastrophic trucking accident claims that I often work with. The methods outlined in this article are directly applicable to many other types of disputes, including those related to personal injuries or death resulting from construction accidents, manufacturing accidents, product defects or medical malpractice. I have even used some of these methods in disputes involving intellectual property and other commercial disputes. Using this "negotiation counsel" model — including face-to-face meetings, genuine expressions of sympathy, identification of key interests, early mediation and customized settlement packages — in-house counsel can find a win–win solution in a broad range of dispute resolution contexts that are usually win–lose or lose–lose.

As an attorney at Scopelitis, Garvin, Light, Hanson & Feary, JIM GOLDEN helps some of the world's largest companies negotiate prompt, reasonable resolutions of high-stakes disputes. A case study based on his work is taught at Harvard Business School and is discussed in his article in the *Harvard Negotiation Law Review*. Golden has consulted with senior staff of the President of the United States and the National Security Council. He can be contacted at *jgolden@scopelitis.com*.

The Traditional Model

When faced with an injury claim, even those in which the company is clearly at fault, many in-house counsel resort to the traditional "delay, deny and defend" strategy of litigation, assuming that a long, drawn-out process and a stiff upper lip will convince the claimant to settle for less compensation in the end. Two major problems arise from this approach.

One, even in cases where liability is crystal clear, companies end up spending enormous amounts of money and time on unnecessary (or unnecessarily long) discovery and lawsuits. Ignoring claimants until their suit is filed — sometimes a year or two after the accident — results in hostility. Positions harden, anger grows and claimants want a pound of flesh instead of an early, reasonable resolution. As a result, resources are wasted as both sides engage in time-intensive, inefficient discovery in an attempt to wear the other side out with technicalities and busywork, gain a stronger bargaining position and prepare for trial. Legal fees, expert fees, travel and other expenses can spiral out of control. Often, catastrophic cases can drag on for years, further draining company coffers and wasting employee time.

Two, this lengthy process robs many grieving or profoundly injured individuals and families of a sense that the right thing was done after the accident. Watching counsel jockey during years of legal gamesmanship repeatedly reopens wrenching emotional wounds, delaying healing and closure for years or a lifetime. Often, profound grief metastasizes into bitterness and abiding hatred. Secondary and avoidable financial harms also multiply, especially in cases where the injured or deceased was the primary breadwinner. This generates an unwillingness to compromise, makes the suit a personal mission to correct perceived injustice, decreases the possibility of a reasonable early resolution, taxes the resources of company legal departments, costs far more dollars in the end, and injures the reputation of companies, their insurance carriers and sometimes their lawyers.

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The New Model

A new, earlier window of negotiation opportunity, however, seizes many of the advantages that the traditional model forfeits, while defraying enormous cost and treating meritorious claimants with compassion. This approach has two tracks: On one, trial counsel investigates, evaluates and quantifies the value of the claim, and, if the claim is not settled on reasonable terms, prepares for

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trial as usual. On the other track, "negotiation counsel" aims for early settlement through an empathetic, problem-solving approach. Using the two-track system minimizes risk — if early settlement should fall through, the trial counsel can still prepare and try the case, thus creating a credible deterrent to unreasonable negotiation behavior by the claimant's counsel. The two tracks are also crucial to effective negotiation; having both demonstrates the willingness of the company to try something new as well as its determination to proceed with litigation should claimants choose not to cooperate.

Relationship building. The negotiation counsel works in a three-stage process to achieve his or her goals. To describe this process, I will use the example of a catastrophic trucking accident. In the first stage, negotiation counsel meets face-to-face, soon after the accident, with claimant's counsel. Negotiation counsel works to establish a mutually respectful professional relationship with claimant's counsel in meetings that frequently last several hours. He or she also conveys sincere condolences to the claimant for the loss, whether in person or through claimant's counsel. Negotiation counsel can even offer a candid and sincere apology for negligent behavior, if indeed his company is clearly at fault.

These unexpected gestures open human connections with the claimant and their counsel, and often mitigate adversarial confrontations. The negotiation counsel may also provide no-strings-attached funds to help with claimant's immediate financial needs, where appropriate, since many victims of catastrophic accidents struggle to pay for funerals, mortgages and other bills previously paid by the deceased or injured.

In some cases, this first stage also includes early, voluntary and informal exchanges of information, rather than waiting for formal discovery. This places the claim on a much faster pace toward resolution. Negotiation counsel informs the claimants that the company wants to do the right thing and works toward a solution that properly compensates the claimants for their loss. At the same time, negotiation counsel firmly states that the company is not willing to pay a premium to settle.

During this stage, the company must take the initiative in promptly investigating, researching and evaluating the case. In essence, it should frontload the investigation. This allows negotiations to happen sooner and also prevents suspicions based on a lack of information from souring the attitudes of both sides. Early investment saves money in the long run, while reasonable and informal exchanges of information facilitates informed trust and speeds the negotiation process.

Formulating a settlement proposal. In the second stage, negotiation counsel meets both with claimant's counsel and the family. In this meeting, negotiation counsel identifies claimant's interests and obstacles to settlement in more depth, and begins to formulate a custom-made settlement proposal that maximizes the value of settlement offers that will subsequently be made at mediation. For example, counsel can offer sophisticated structured payments or investment alternatives; specific kinds of handicap assistance for injured claimants; ideas (obviously, without offering legal, tax or investment advice) about financial planning options, spendthrift trusts, tax strategies, housing or transportation options tailored to meet the needs of the claimant or to set aside funds for a memorial for the deceased. Throughout this process, negotiation counsel helps the claimants and their counsel to visualize the benefits offered by early custom-designed settlements, including certainty, financial security and emotional closure.

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Moving mediation forward. The third stage involves moving mediation forward so that it occurs years earlier than usual. Because the claimants and their counsel have been treated with empathy and respect, the initial demand is often lower than normal. In turn, companies often offer more reasonable opening offers, thus improving the probability of prompt, successful resolution.

The ability of negotiation counsel to develop proposals that are custom-made for the needs and interests of the claimants also increases the odds of success at mediation. Importantly, claimants will often settle for a lower sum if they are spared a years-long wait. Ideally, the negotiation counsel will also have studied or taught negotiation theory and practice. If a lawyer follows such study with full-time work as negotiation counsel, he or she develops a heightened emotional and relational intelligence (something that law school and the traditional model of litigation do not provide) and a broad range of skills and creative methods that facilitate win–win solutions.

Such specialization builds a level of competence that maximizes the probabilities of prompt reasonable resolutions. Of course, the negotiation track is not always successful. In those cases, trial counsel for the defense litigates as usual. But the inclusion of negotiation counsel as part of the defense team dramatically improves the odds of an early, reasonable resolution.

This faster process results in significant savings for companies. Because of the immediacy of the offer, claimants usually settle for less than they would at the end of a longer litigation process, so companies garner substantial savings. The company in which I developed and continue to use these methods experienced these savings. In my capacity as outside counsel with the firm of Scopelitis, Garvin, Light, Hanson & Feary, other companies that I now represent have also experienced savings. Additionally, companies using similar approaches have also cut costs dramatically. Mark Whitehead of J B Hunt, one of the nation's largest trucking companies, estimates savings on large claims using a similar method at between 15 and 30 percent. Toro has saved $50 million on claims and $6 million in insurance premiums in a products liability context, and General Electric has quantified savings at $10 million per year using interest-based negotiation methodology. The University of Michigan Health Care System is only one of a growing number of top-notch health care providers that have experienced a profound reduction in the number of claims filed and the transactional costs per claim since adopting an early engagement methodology.[1]

Implementation

Negotiation counsel can be an in-house attorney or outside counsel who specializes in such resolutions. But to be effective, in-house counsel should see that their new model effectively implements certain proven principles and methods. Chief among them is a sincere desire to do the right thing. Genuine empathy and the ability to connect with others in the context of profound human tragedy are crucial. The resulting relationship enables negation counsel to ask the claimant how the tragedy has changed the lives of their family, and listen to the answers with genuine interest and compassion.

Negotiation counsel must also possess the inner strength to maintain equanimity when insulted, while gently moving the discussion back into productive channels. She or he must also possess the ability to leave ego and posturing at the door and foster an environment of cooperation and mutual respect. He or she must shun the absurd positions that destroy credibility, while showing an awareness that weaknesses often exist on both sides of the claim. In addition, the negotiation counsel should be nimble, quickly adapting to unexpected needs of the claimant and claimant's counsel and dedicated to spending the time and energy required by numerous face-to-face meetings, often involving extensive travel.

Many counsel fear that their case will appear weak if negotiation counsel initiates face-to-face meetings early in the litigation process. However, the honest, problem-solving approach, which builds the company's and lawyer's credibility, conveys quiet strength and a firm resistance to unreasonable demands, rather than weakness. I have noticed this on countless occasions. Rapport earned over

How the New Model Benefits In-house Counsel

Time and Energy

1. Time saved from complex formal discovery means more time for you to do your job well and pay more attention other issues. This saved time becomes even more extensive when you consider the resources required to comply with new rules concerning ediscovery. The negotiation counsel model achieves better and earlier results, without draining the life out of legal departments. It allows for a healthier work–life balance for you and your staff.

Money

2. You save your company money, and thus become a more valuable employee. Your company also benefits. Providing initial funds for the immediate needs of the claimant prevents secondary and tertiary costs, such as home foreclosure, that a claimant or jury may demand payment for later. Early settlement also eliminates the risk of a large reward by a runaway jury, or higher demands from a claimant who has already invested immense sums in the litigation.

Personal Fulfillment and Satisfaction

3. Doing the right thing is refreshing. Not surprisingly, making a positive contribution to the company and the lives of people is deeply fulfilling. In addition, the negotiation counsel method improves public relations and gives companies a track record for reasonableness. It can also help those involved in an accident reconcile — truck drivers, for instance, can sometimes find complete emotional recovery from trauma if negotiation counsel conveys their sincere regrets to the family. Also, the findings from early investigations can sometimes prevent similar accidents, saving lives and minimizing costs proactively. The negotiation counsel method boosts morale across the board, giving you and your legal staff more job satisfaction.

time, rather than shows of ego and unreasonable posturing, move this strategy along. Finally, the lengthy personal meetings give both lawyers a chance to see the merits and shortcomings of their positions, and thus more accurately assess a reasonable settlement.

Benefits to In-house Counsel

Using this compassionate, cost-saving approach dramatically increases the value of in-house counsel to his or her company, thus increasing job security, taking pressure off company legal budgets and reducing busywork.

True, a shorter litigation period and less busywork means fewer hours logged for outside counsel. But trial counsel is still required on the first track, so outside counsel continue to be a crucial part of the defense team. Indeed, as more companies adopt similar alterna-

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tive methods, outside counsel would be wise to be the first to adapt and differentiate themselves from other firms, thus earning the genuine gratitude of present clients and new clients committed to the new model.

Parting Words

Companies across the nation already use some form of alternative dispute resolution, usually late scheduled mediations in the majority of their cases. The real question now is, will we use it right away, or much later, after we've already accrued enormous waste, cost and human damages?

Using negotiation counsel early in the process saves companies large amounts of money, increases the value of in-house counsel to their companies and charts a more humane course for claims resolution. In short, it's a win–win. And this is not just a great idea — it's a method with a track record of real-world results in highly competitive industries and emotion-packed circumstances. Using the earlier window of opportunity really does pay off.

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NOTE

1. Jim Golden, H. Abigail Moy and Adam Lyons, "The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases," 13 *Harvard Negotiation Law Review*, 211 (Winter 2008).