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The Importance of Writing an Effective Settlement Demand

By Jason Flores, Esq.

Make no mistake about it: writing demand letters to insurance carriers on behalf of your personal injury clients is about as exciting as standing in line at the DMV. Nobody actually looks forward to it, but its importance cannot be overstated.

An attorney's settlement demand letter to an insurance carrier can be one of the most pivotal and crucial points in establishing the outcome of a client's case.

A good demand letter could potentially save your client thousands of dollars in case costs and save you an immense amount of time and effort on a case that could have been resolved before filing.

The Benefit to You

The time and effort you put into writing a strong demand letter will provide you with an invaluable tool that will carry you all the way through trial if your case does not settle.

A well-written demand that provides your case facts, case law, and liability arguments, and which lists your client's injuries in specific detail, will lay out the foundation for a well-organized and well-prepared case. Aside from the benefits of showing your adversaries that you mean business, taking the time to write a detailed and extensive demand will allow you to know your case intimately from the onset.

Moreover, taking the time to write a detailed settlement demand from the start will also provide you with a strong foundation for a potential mediation brief and will serve as a wonderful reference point during discovery and depositions.

Know Your Audience

As a former auto insurance adjuster, I can tell you that a poorly written and generic demand can do more to hurt the settlement value of the case than help it.

Many attorneys make the mistake of thinking that putting the time and effort into a demand is pointless since "they are not read anyway." True, not all insurance adjusters will take the time and effort to fully review, analyze, and read the entirety of your demands, but in my experience many of them will. I certainly did.

By adopting the mindset that your demand will not be read you risk missing an opportunity to establish a potentially higher settlement value to the case. You also risk missing an opportunity to establish your professionalism as an attorney. But most importantly, you risk missing an opportunity to show your adversary that when push comes to shove, you know your case inside and out. Keep in mind that many insurance carriers keep a track record of the firms and attorneys they are dealing with - and yes, you will be judged!

Additionally, be cognizant of the fact that if you do not settle with the carrier and you end up filing a lawsuit on behalf of your client, your demand will eventually end up in the hands of defense counsel. Rest assured that if your demand is poorly written and does little to establish the likelihood of you prevailing in trial or at arbitration, defense counsel will see no reason to take you or your case seriously.

There is a balance and art form to demand writing. You have to appease the insurance adjuster who will emphasize your client's medical specials while supporting the claims with case law and evidence that will matter more to future defense counsel.

While it may seem like more work to add to your already busy schedule, I recommend tailoring your demand to all potential scenarios and all potential readers. In my previous life as an Insurance Adjuster, I found that a detailed and well put together demand was an indication of an attorney who was serious about the case and warranted extended negotiations.

How Much is Too Much?

How long should a settlement demand be? Is it better to send a simple two-page demand or a package including an extensive 10-page demand letter complete with exhibits and legal arguments that tell the world why your client deserves the money she is asking for?

The answer is, in classic lawyer form: It depends.

For instance, you may have a client with serious injuries and a liable third-party with inadequate insurance policy limits. In this scenario, the claim could potentially be resolved with a short one-page demand and some accompanying medical bills. Keep in mind, however, that if you still anticipate following up on additional insurance coverages such as underinsured motorist coverage, a more detailed and informative demand might be in order.

On the other hand, if you have a complex case, suitable insurance coverage and anticipated litigation, a two-page demand does little to aid your cause.

Focus on Telling a Compelling Story

Is your client an avid runner or cross-fit junkie who can no longer participate in her natural outlet because of her injuries? If yes, explain in your demand how that impacted the client by detailing the emotional effect of her physical injuries and how they were exacerbated by not having her daily/weekly physical or emotional outlets. Maybe your client is a father who regularly plays sports with his kids. Talk about what that father went through emotionally by not being able to engage in those activities with his kids.

Do your best to humanize your client in a way that will allow your potential in-

surance adjuster to be able to relate to your client. After all, it's difficult not to have sympathy for a person who may have the same interests or hobbies as we or someone close to us have. As trial attorneys, we do our best to make our clients relatable to juries; we should be following the same approach in our demands.

Be Specific About Injuries and Treatment

Take the time and effort to go through all of your client's medical records with a fine-tooth comb.

Most of us have made a habit of briefly summarizing the injuries and treatment received by a client and consistently asking the reader to reference an attached medical exhibit. While it is true that medical records submitted with a demand will be reviewed by the insurance carriers' independent medical reviewer, do not let that prevent you from getting into more detail. For example, if your client had a knee surgery, be specific about the details of the procedure from the incision size to the number of sutures/stitches/staples it took to close the incision. If your client had an epidural injection talk about the size of the needle, the preparation procedures, the amount of solution that was injected into the site, etc. Again, the concept is to make it easy for the reader to understand what your client had to endure by bringing in the specific details of procedures and treatments instead of sending them to an outside source to do so.

There are other benefits of taking the time to read through your client's medical records and detailing them in your demand. I have found that it will allow you to become familiar with the intricacies of your client's injury complaints, as well as their overall progress throughout treatment and allow you to point out any setbacks your client may have suffered in the process. Most importantly, it will ensure that you are not hit with the surprise of defense counsel letting you know that your client indicated to her physical therapist that she was feeling 100% better two weeks into a 3-month rehabilitation program.

What to Demand

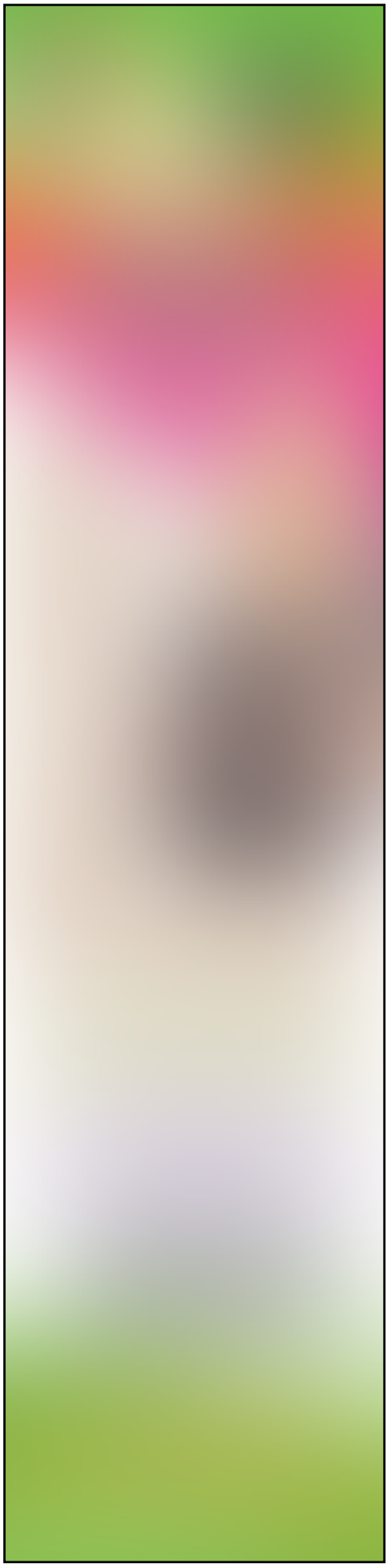
Another conundrum: Should you ask for everything including the kitchen sink, or go low and leave less room for negotiation? Again, what you demand depends on the circumstances, but nothing will end negotiations more quickly than demanding an unreasonable amount of money.

If you truly value the opportunity to settle cases pre-litigation, you must understand the value of the case and educate your client . . . early.

Overshooting the value of your case will not only sour potential settlement opportunities, it may also serve to make the attorney who submits such a demand look incompetent. You run the risk of having the insurance carrier or potential defense counsel associating your eager demand with the likeness of an attorney who is being greedy, does not understand the law, and ultimately is not looking to settle the case. During my time as an insurance adjuster, I can recall several conversations I had with attorneys who could not seem to justify the high value they were putting on a case. It was hard for me to offer more money on a case when they could not explain why they were asking for the original amount in the first place.

A good approach in finding a "reasonable" number to place on your settlement demands is looking at prior jury verdicts for similar cases and similar injuries within the venue that your client's injury or incident took place. I have found that this will also give you a great sticking point with the insurance carrier when you justify the valuation of your case. Of course, your own experience in settling and litigating prior cases should also serve as a good indicator of the value of your client's cases.

I also recommend having a conversation with your client early on so that you are both on the same page. Consider carefully whether to include influential family members in these conversations. Controlling their expectations will help control your client's expectations as well. We have all come across the client who has made settlement negotiations nearly impossible



because they believe the value of their case is astronomically higher than what jury verdicts indicate for similar cases. Avoid these issues by educating your client on the potential value of the case from the beginning so that settlement negotiations can be as fruitful as possible for everyone involved.

Know the Time Limits and Remember to be Courteous

The California Department of Insurance Fair Claims Settlement Practices Regulations provides that:

(b) Upon receiving proof of claim, every insurer, except as specified in subsection 2695.7(b)(4) below, shall immediately, but in no event more than forty (40) calendar days later, accept or deny the claim, in whole or in part.

(c)(1) If more time is required than is allotted in subsection 2695.7(b) to determine whether a claim should be accepted and/or denied in whole or in part, every insurer shall provide the claimant, within the time frame specified in subsection 2695.7(b), with written notice of the need for additional time. This written notice shall specify any additional information the insurer requires in order to make a determination and state any continuing reasons for the insurer's inability to make a determination. Thereafter, the written notice shall be provided every thirty (30) calendar days until a determination is made or notice of legal action is served. If the determination cannot be made until some future event occurs, then the insurer shall comply with this continuing notice requirement by advising the claimant of the situation and providing an estimate as to when the determination can be made.

(Cal. Code. Regs., tit. 10, § 2695.7, subd. (b) & (c).)

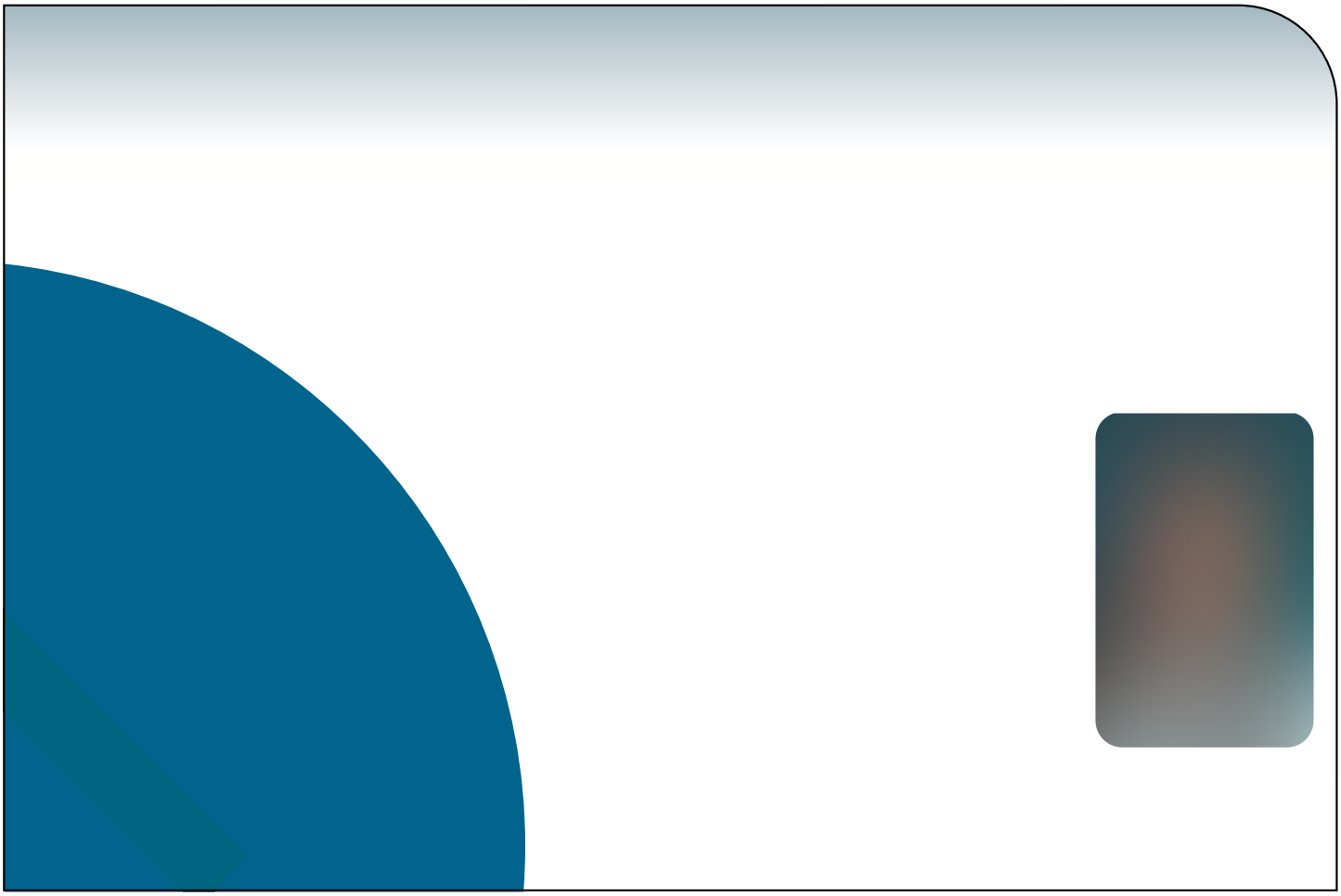
Further:

(b) Upon receiving any communication from a claimant, regarding a claim, that reasonably suggests that a response is expected, every licensee shall immediately, but in no event more than fifteen (15) calendar days after receipt of that communication, furnish the claimant with a complete response based on the facts as then known by the licensee. This subsection shall not apply to require communication with a claimant subsequent to receipt by the licensee of a notice of legal action by that claimant.

(Cal. Code. Regs., tit. 10, § 2695.5, subd. (b).)

During my days as an Insurance Adjuster, I entered my workday with an average of three to four new claims a day. Yes, new claims, daily. What this meant to me was that I felt miserably overworked and overwhelmed. Keep this in mind when you get those calls from insurance adjusters who are asking for extensions to review and respond to your demand or are advising you that investigation of a claim is ongoing.

Nothing adds more to the stress of an adjuster's workday and workload than being belittled by an attorney when asking for



more time to review a settlement demand or when requesting additional documentation to validate a settlement offer. In my experience, delays or the need to request additional documentation from attorneys was often out of my control. That is, I was being asked by other departments within the company to request additional medical documentation or ask for an extension in order to allot more time for record review.

You should also note that sending a demand on behalf of your client and giving five days for which to respond is only going to warrant a phone call requesting an extension. The recommendation here is that you allow at least twenty days for the insurance carrier to review your settlement demand. If an extension is requested by the adjuster it should be accompanied by an explanation as to why the additional time is being requested and granted unless completely unreasonable.

Of course, the complexities and varying nature of the case may change the time frame for which you could demand a shorter turnaround time for a response. For example, it may be the third time the adjuster called you requesting an extension or the adjuster is requesting an "open" extension for which to respond. Under these circumstances, a gentle reminder to the insurance adjuster about your duty to your client to move the case along may be warranted. Use your best professional judgment. A good rule of thumb is to be courteous and grant an extension when asked.

Conclusion

Taking the time to write a detailed and informative demand is a great investment of your time that will provide a solid foundation for your case. Becoming well versed on the Department of Insurance Fair Claims Settlement Practices will provide you with valuable knowledge of an insurance carrier's duties during the pre-litigation phase. Use all of the tools available to you in order to make the most out of your settlement demands and maximize the recovery for your client.

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