

# *Tips from the Other Side*



***Experience gained from working  
for “the other side” at a  
multi-state insurance defense firm.***

*by Samuel R. Clawson, Jr.  
Christy R. Fagnoli*

# INTRODUCTION

*We spent the first decade of our legal careers working for “the other side” at a multi-state insurance defense firm before opening a state-wide plaintiff’s personal injury practice devoted to life altering injury and death cases in 2017. We were recently asked by a colleague in the plaintiff’s bar to share our viewpoint on the plaintiff’s practice as “reformed” defense attorneys who had “seen the light.” We thought it might be helpful to our colleagues and fellow SCAJ members if we expanded further on those thoughts in the form of an article in **The Justice Bulletin**.*

## SETTING THE RESERVE

Get ahead of the curve with respect to the adjuster setting the claim reserve. This is the money that is earmarked for the ultimate payment to settle the claim. It is easier for an adjuster to lower a high reserve than to raise a low reserve, so it is crucial for the initial reserve to be as high as possible.

This is accomplished by coming out of the gate strong with a proper demand that contains all relevant documentation and information to support your demand amount.

## SEND A POWER DEMAND

First notice letters are, at times, necessary to prevent spoliation of evidence or to determine the limits of automobile insurance coverage, but they should be short on specifics concerning the facts of loss, injuries or damages, which are best covered in your demand package. When possible, send the

demand as a PDF converted from a Word document (not scanned), so that it is easily searchable, and the adjuster can cut and paste portions into their system. Make the adjuster’s job easy in this regard. Write it like a defense suit report and cover facts of loss, liability, injuries, damages, venue, etc. to support the reasonableness of your demand and underscore your depth of knowledge of the case and readiness to file suit. Send a complete demand package with all relevant medical records and bills. Include an itemized table of the medical expenses. Engage in brutal honesty by acknowledging/embracing imperfections in your case. It gives you credibility. Then shift the focus to your strengths. Understand how to properly create a bad faith threat and only seek punitive damages when supported by the facts. Adjusters are drowning in claims and anything you do to make their lives easier in terms of evaluating your claim will pay off for you in the end.

## UNDERSTAND COVERAGE

It is crucial to understand how certain insurance policy provisions and exclusions can affect coverage. For example, there are ways to potentially draft around the intended and expected injury exclusion or the definitions of occurrence or accident, such that the insured will only draw a reservation of rights letter rather than a denial of coverage. Later, if a question concerning insurance coverage, stay vigilant for situations where the adjuster or defense attorney are improperly asserting coverage defenses and call them out on it. Few things make a defense lawyer more uncomfortable than accidentally/improperly opining on coverage issues.

## THE VERY BUSY DEFENSE ATTORNEY

Most defense attorneys are overworked. They have lots of cases and often their systems are not arranged for maximum efficiency because of requirements and constraints placed upon their firms by insurance companies. While some defense attorneys may look for "billing opportunities," most have plenty of files to bill and are not interested in creating unnecessary work. Don't assume the actions of a defense attorney are motivated solely by billing. Good defense attorneys will resolve good cases early for a reasonable value and not unnecessarily work the file just for the sake of padding the bill. Instead, ask yourself what other purpose could be furthered by their actions and counter their strategy.

## DON'T BE A JERK

Be nice, be reasonable, and be responsive when dealing with the adjuster and defense attorney.

Sometimes they can be nasty, unreasonable and completely unresponsive, but don't be a jerk in response. It is human nature to work harder to achieve a mutually agreeable outcome when you have a positive working relationship with your counterpart. You can aggressively represent your client while attempting to maintain a positive, productive relationship with adjusters and defense counsel. Find a way to connect with them on some level and use that connection to move your case forward.

## DICTATE PACE AND TEMPO

Always strive to dictate the pace and tempo of your case from the outset and throughout litigation. Keep your foot on the gas and don't ever allow a case to sit on the shelf for any significant length of time. Maintain tight deadlines during discovery and stay in regular contact with the defense attorney. This will keep your case on the very busy defense attorney's radar, which is a prerequisite to the attorney learning, evaluating, and ultimately settling the case. Consider sending requests for admission with your interrogatories and requests for production, because it forces the defense attorney to look at a file that may otherwise sit on his or her desk for many months without attention.

## GET THE DEFENSE ON THEIR HEELS

Many defense attorneys practice in just a couple of areas and see the same causes of action so often that they can turn on the autopilot when drafting pleadings and responding to discovery. Where appropriate, consider pleading less common causes of action and using custom discovery requests. For example, defamation and violation of the Unfair

and Deceptive Trade Practices Act are two causes of action that tend to get the attention of adjusters and defense attorneys, especially when they don't see those types of cases often, and they can be good case value drivers when used in the appropriate circumstances.

## OBTAIN THE CLAIMS FILE

Always request the claims file in discovery, but be specific with your request to avoid time consuming motions practice. Consider requesting all materials generated, sent or received prior to the retention of defense counsel related to your case, including correspondence, emails, call logs, claim logs, adjuster and manager notes, claim summaries, written or recorded statements, interviews, investigative reports, photos and video. In the request, specifically state that you are not seeking financial information related to reserves or settlement authority.

## INCREASE DEFENSE COSTS

Drive wedges between co-defendants who are represented by the same defense attorney. If you can create or highlight a conflict of interest, the insurer may have to split the defense file and hire separate counsel for each defendant, resulting in a significant increase in defense costs. Similarly, if coverage defenses are being asserted by a defense attorney or adjuster, pushing back on the obvious conflict inherent in taking such positions against the interest of the client/insured could result in the insurer splitting off a coverage file and incurring additional costs by retaining coverage counsel. However, keep in mind that defense rates vary wildly between insurers and are only one of many factors considered when an insurer is evaluating settlement.

## MAKE MEDIATION A SUCCESS

Ensure that sufficient discovery has been conducted prior to mediation to allow the defense attorney and adjuster to fully evaluate the case. Don't send new information, medical records, medical bills or lost wage verifications to the defense attorney and adjuster shortly before or at mediation. Insurance companies are big, slow, cumbersome, and bureaucratic. Defense attorneys are typically required to submit a pre-mediation report to the carrier 30-45 days prior to mediation. This is the report that the insurance company uses to evaluate the case and set settlement authority, which often involves roundtables with management in significant cases. It is likely that legitimate, related information provided close to mediation will not be considered and will not affect the settlement authority. Always require that the adjuster be physically present at mediation. Not only is it required by the rules, but it significantly increases the probability of settling the case that day. It is helpful to the defense attorney to have the adjuster in the room and engaged, as opposed to speaking with the adjuster by phone while they are working on twenty other claims that day.



Sam Clawson and Christy Fargnoli are the founding members of Clawson Fargnoli, LLC, a boutique personal injury law firm devoted to life altering injury and death cases. Their practice areas include motor vehicle accidents, boating accidents, dram shop, Title IX, campus sexual assault, daycare abuse, defamation, insurance coverage / bad faith, nursing home abuse and premises liability. More information can be found at [www.clawsonfargnoli.com](http://www.clawsonfargnoli.com).

# NO MATTER HOW YOU SLICE IT, WE'RE STRONGER TOGETHER.

**Is your capacity to take on more cases limited?** Bluestein Attorneys is proud to have associated with more than 800 attorneys, who have made us part of their team to get the job done. Learn more at [teamwithbluestein.com](http://teamwithbluestein.com).



*"Working with Bluestein Attorneys is like having a great law partner within your firm."*  
– Joseph D., Esquire

[TEAMWITHBLUESTEIN.COM](http://TEAMWITHBLUESTEIN.COM)

Allison Sullivan is responsible for this content.



BLUESTEIN THOMPSON SULLIVAN, LLC  
1614 TAYLOR ST | COLUMBIA, SC