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Don’t Mess with the Bull, You’ll Get the Horns

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Running with the Bulls

Running with the Bulls: How to Win Top-Dollar Settlements is the title of the 2018 book by nationally recognized plaintiff's attorney, Nicholas Rowley. Attorney Rowley's websites, nicholasrowley.com and tl4j.com (Trial Lawyers for Justice), state that Attorney Rowley has achieved over $2 billion in verdicts and settlements for his clients, including:

- $131 million against a bar/restaurant for alleged overservice of a patron who was later involved in a motor vehicle accident;
- $40 million to a family of a patron of a national restaurant chain who was stabbed to death in a fight with two other men;
- $38.6 million for a man who fell from a hotel balcony while intoxicated;
- $21 million for a burn injury resulting from a motor vehicle crash into a restaurant;
- $17 million in a premises liability brain injury case involving a fall from a hotel balcony;
- $11.25 million for a premises liability brain injury case; and
- $1.5 million for a woman who tripped over a variable height curb in the parking lot of a national retailer.

In the introduction to his book, Attorney Rowley describes, in detail, his experience of running with the bulls in Pamplona, Spain. A running of the bulls is an event that involves running in front of a small group of bulls, typically six but sometimes ten or more, that have been let loose on sectioned-off city streets, as part of a summertime festival. The "Bulls" Attorney Rowley references as a central theme of his book are insurance companies, corporations, and the civil defense bar, who he says must be confronted and overcome, to achieve "justice" for clients through trial or settlement.

Settlement Strategies

Attorney Rowley's settlement strategies for taking on the civil defense Bulls include:

- Bypassing defense counsel and talking only to decision makers.
- Saying no to mediation, when appropriate.
- Use of demand deadlines with consequences
- Walking out of mediation, when appropriate.
- Using past results to leverage fear of uncertainty.

It is the view of Attorney Rowley that, because defense counsel do not have the ultimate authority as to what dollar amount will be offered in settlement on a case, plaintiff's counsel should never discuss the merits of a case or engage in settlement negotiations directly with defense counsel. Attorney Rowley advises that any settlement discussions with defense counsel are just a waste of time, only works to the benefit of opposing counsel, and does not advance plaintiff's interests at all.

Attorney Rowley also counsels as to the power of "no", meaning refusing to mediate when appropriate and refusing to negotiate down from policy limits settlement demands. He advocates for:

- Selecting a case settlement value representing fair compensation to the plaintiff.
- Setting a deadline to respond to the demand.
- Addressing the demand to the defendant decision maker.
- Setting the consequences for rejection of the demand.
- Follow up on the deadline after it expires by increasing the demand.
- Do not waiver, meaning do not negotiate down from the demand, only up.

A technique advocated by Attorney Rowley is to increase pressure to settle by communicating increasing settlement demands during the negotiation process. Attorney Rowley advocates setting an initial demand of policy limits in the first demand letter, with an expiration date and a statement that any counteroffer constitutes a rejection of the settlement offer. Attorney Rowley counsels that the demand letter communicate that the next demand will be for a stated increased amount and that new demand will expire on a date certain, including the start of mediation or trial.

Attorney Rowley recommends citing to past large monetary case recoveries to encourage settlement and also recommends threatening to bring in top local or national trial counsel to motivate the defendant or its insurer to settle.

As to mediation, Attorney Rowley counsels that the defense Bulls' fear of a substantial verdict is plaintiff's friend, and the plaintiff's counsel should convince the defense team that he or she is prepared to try the case and expects to win. Attorney Rowley advises trying good cases and settling the bad ones. His golden rule regarding settlement and trial: "Always settle cases you are prepared to try, but never try a case you are only prepared to settle."

Plaintiff's Mediation Strategies and Settlement Rules

Attorney Rowley advocates the following practices with respect to case mediation:

- Requiring the defendant to put up a reasonable settlement offer to get to mediation.
- The plaintiff always chooses the mediator.
- Communicating a pre-mediation demand that expires on the day of mediation.

Attorney Rowley counsels that there are eight rules to achieving maximum financial payout through settlement.

Rule 1: Commit to not settling too quickly or cheaply.

Rule 2: Make demands for the policy limits promptly and get high reserves set. (He states that this step opens up the insurance policy but requires that the demand letter get to the insurer and not just defense counsel).

Rule 3: Do not take a case you are not willing to go to trial on.

Rule 4: Make your name known or bring a feared trial counsel colleague.

Rule 5: Do not believe what you are told by insurers and their counsel who may hold back settlement authority.

Rule 6: Avoid cookie-cutter approaches to settlement and consider waiving economic damages and moving to exclude economic damages from the evidence at trial.

Rule 7: Do not always agree to mediate; but if mediation is sought:

- Demand a formal offer to mediate.
- Prepare to walk out of mediation at any time.
- Get an offer in writing before mediation.
- Direct settlement communications to the case decision maker and not defense counsel.
- Resist court-sponsored mediations.

Rule 8: Never depend on a settlement; meaning, do not confuse plaintiff's attorney's financial goals with the merits of the case for the plaintiff.

Emphasis on Non-Economic Damages

Attorney Rowley stresses the settlement value of non-economic damages and advocates waiving economic damages in certain cases in order to put the focus on the non-economic components of the case. In such circumstances, Attorney Rowley argues that the non-economic damages are the biggest part of the case. In doing so, examples of some non-economic damages that he emphasizes are:

- Chronic pain.
- Inability to walk normally.
- Loss of a favorite past time.
- Loss of consortium.
- Loss of the ability to have children.
- Loss of meaningful life events, such as dancing with a daughter at her wedding.

Attorney Rowley encourages presenting damages differently than the standard calculation of special damages (medical expenses and lost income), which are often the focus at mediation and in settlement negotiations. Instead, he recommends emphasizing non-economic damages, which he characterizes as the value of something that cannot be replaced.

At mediation or trial, Attorney Rowley uses stories and examples to describe the claimed pain and suffering of his clients. These stories focus on the value of non-economic assets which he lists as health, happiness, freedom from pain, and the love of others.

Attorney Rowley counsels that the wrong way to negotiate a case is to fixate on the traditional special damages of lost income and medical expenses. He lectures that the right way to settle a case is to tell stories that illustrate non-economic damages. He argues that representative verdicts and settlements based on past similar cases can be irrelevant and urges his litigation team to look at each case as an outlier of past results.

Attorney Rowley also advocates putting a high dollar value on a case early in the process in order to motivate insurers to set high reserves within 90 days of the assertion of the claim. In communicating with the prospective defendant or their insurer, Attorney Rowley recommends citing to actual high dollar case verdicts and case transcripts in settlement demands and negotiations.

Attorney Rowley argues that the establishment of a damages formula is critical to successful settlement negotiations to get top-dollar results for the client. His damages formula looks at:

- What are the elements of recoverable damages in the jurisdiction.
- What has the client suffered.
- What is the amount of time the claimant has or will suffer.

Attorney Rowley argues that for any injury that is permanent, such calculation must factor in the life expectancy of the plaintiff.

Attorney Rowley is a proponent of listing each element of non-economic damages and calculating them at mediation or at trial for the jury. He advocates placing a dollar value between $1,000.00 and $10,000.00 for each element of non-economic damages, multiplied by each month post-incident over the life expectancy of the plaintiff. He lists those non-economic damages, each of which has a dollar value for the life of the injury, as follows:

- pain
- suffering
- loss of enjoyment
- humiliation
- loss of consortium

Opening the Policy

Attorney Rowley advocates that the most important factor to taking on the defense Bulls and obtaining large settlements is what he terms "opening the policy", which is reaching insurance dollars beyond the policy limits. It is Attorney Rowley's strategy to demand the policy limits or less from the prospective defendant which he says exposes the insurer for excess liability for failure to pay and resolve the case based on a potential bad faith

theory. Attorney Rowley lists the nine key elements to a demand letter aiming to "open the policy" and reach settlement dollars beyond the insurance policy limits.

1. Offer an opportunity to settle the case within the policy limits.
2. Put the offer in writing.
3. Set a deadline.
4. Give the insurance company a reasonable amount of time to evaluate the case.
5. Remind the insurer of its obligation to communicate settlement demands to its insured.
6. Do not require the insured to act (in order to avoid a noncooperation defense).
7. Remind defense counsel of their "inherent" conflict of representing both the insurer and the defendant.
8. Address multi-claimant problems.
9. Accept responses only in writing.

Policy Demand Letters

Attorney Rowley counsels that a properly crafted demand letter to the defense Bulls is the first step in the overall process of achieving maximum settlements for the client. He lists those steps as follows:

1. Demand the policy limits in a written demand letter.
2. File suit.
3. Demand the true value of the case, which exceeds the policy limits.

Attorney Rowley also advocates the following practices for effective demand letters:

1. Make demands by email which can be easily forwarded to the insured defendant.
2. Direct demands to the defense attorney and all insurance company representatives and decision makers.
3. Require the demand be forwarded to insurance company decision makers.
4. Require the demand be sent to the insured's private attorney.
5. Spell out the ramifications of not paying the demand, namely a bad faith action against the insurer.

Elements of the Settlement Demand

As discussed above, Attorney Rowley is a proponent of the theory that insurance bad faith is established by the failure of the insurer to settle a case within policy limits when liability is reasonably clear. He lists the following requirements of a clear and unequivocable settlement demand:

1. The terms of the settlement demand are clear enough to form an enforceable contract, if accepted.

2. All third-party claimants are joined in the demand. (Policy limits must be offered to all parties by

a set deadline to prevent the client from seeking a verdict in excess of the policy limits.)

3. The settlement provides for a release of all insureds.

4. The demand is within the policy limits and reasonable.

5. The demand must give the insurer adequate time to investigate the plaintiff's conduct, its insured's conduct, the claimant's injuries and damages.

Leveraging Alleged Bad Faith

Attorney Rowley strategizes that setting up the case for a bad faith claim and exposure to reinsurance forces the primary insurer to put the reinsurer on notice, thus creating pressure to settle the case at the policy limits.

In California, where The Rowley Law Firm is based, insurers have a duty to settle claims against insureds pursuant to the covenant of good faith and fair dealing implied in all policies. *Communale v. Traders & General Ins. Co*., 50 Cal.2d 654 (1958). There is an obligation to accept a reasonable settlement within policy limits where there is a "substantial likelihood of a recovery in excess of those limits." *Johansen v. California State Auto Inter-Ins. Bureau*, 15 Cal.3d 9, 14 (1975). Whether to accept a policy limits demand depends on whether the settlement demand is reasonable under the circumstances. "The duty of good faith and fair dealing does not impose a categorical obligation to accept a settlement demand regardless of cost." *Continental Casualty Co. v. United States Fidelity & Guaranty Co.,* 516 F.Supp. 384, 389 (N.D. Cal. 1981).

The Triangle of Promise

Attorney Rowley also advocates exploiting what he calls the "triangle of promise", meaning the relationship between the insurance company, the defendant, and the plaintiff. Using the "triangle of promise" means exposing what he sees as the conflict between the interests of the insurer in achieving cost-effective settlement with the interests of the defendant in having the case settled within its insurance policy limits. Attorney Rowley argues for leveraging this tension and creating chaos between the insurer and the defendant.

Attorney Rowley states that it is important to educate the insured defendant as to this conflict. He advocates directing demand letters to the insured defendant and the insurer through defense counsel. He states that making demands within the policy limits will create pressure from the insured to the insurer to resolve the case. He advocates explaining to the defendant insured the consequences to the insured if the insurer fails to pay of exposing the defendant to liability above the policy limits.

Attorney Rowley recommends the practice of marking the demand letter to the defendant insured as an exhibit at a deposition of the defendant and inquiring of the defendant's representative whether he or she had seen the letter to the insurer presenting the opportunity to settle the case within policy limits. Attorney Rowley counsels that this strategy documents the evolution of the bad faith case the insured will have against the insurer for failure to resolve the case within policy limits.

Attorney Rowley also advocates utilizing the insured's personal attorney to exert additional pressure on the insurer. He lists the defendant's personal attorney as a necessary party on all letters demanding to settle the case

within insurance policy limits.

Attorney Rowley contends that making a demand for the full policy limits right away triggers the first step in a potential bad faith case. He states that making a policy limits' demand is critical and that the demand letter seeking policy limits should spell out the insurer's obligations and the consequences of failure to settle. He states that it is important to support the demand letter with the facts of the case, the specifics of injury, and the amount of medical bills, so the insurer cannot claim they need additional information to evaluate the case.

Attorney Rowley states that communication that reaches the insured policy holder creates the necessary pressure on the insurer to resolve the case within policy limits or face bad faith liability.

Attorney Rowley argues that the insurer's failure to communicate policy demands to the insureds makes the insurer responsible for a verdict in excess of the policy. He counsels, however, against depending on the insurer to communicate with its insured regarding the opportunity to settle within policy limits. He advocates directing a written settlement demand to each defendant, all decision makers and the defendant's private attorney, through defense counsel, but addressing the letter to each of them, with a request to defense counsel to forward the demand.

Attorney Rowley states that a key to exerting potential bad faith pressure on an insurer is the requirement that the insurer must communicate demands of settlement to the insured.

Attorney Rowley notes the existence of multiple defense arguments to a settlement within the policy limits as follows:

- There was a tender of policy limits in a timely manner.
- The insured defendant will file for bankruptcy.
- The insured defendant did not cooperate.
- There were multiple insured parties.

Attorney Rowley counsels that the plaintiff's bar request production of insurance policies, both primary excess and all related declarations pages. He also advocates requiring a declaration under oath by the policyholder that all policies in effect at the time of the loss have been produced.

Attorney Rowley emphasizes that the key to achieving maximum results for a client is a properly drafted demand letter, which contains the following components:

- Direct the letter to all members of the defense team including the defendant, its insurer, defense counsel, and private counsel for the defendant.
- Demand policy limits.
- Set a deadline.
- Open the policy.
- Tell a human story.
- Outline what witnesses will say.
- Warn that the claimant will seek monies above the policy at trial.

- Remind the defense team of the insurer's obligation to its insured.
- Expose the conflict requiring the insurer to protect the financial interests of the defendant.
- Support the claims through necessary evidence of damages, including medical records and bills.
- Set up the case for a bad faith claim if the demand is denied or delayed.
- Seek to set high reserves.
- Press the conflict between the insurer and its insured.
- Always stay polite.

Response of the Defense

As a general matter, an insurer does not have a duty to settle, but is obligated to make reasonable settlement decisions. In many jurisdictions, an insurer's failure to make reasonable settlement decisions can result in the opening of the policy limits. However, the insurer can protect itself from liability exposure in excess of the policy limits by responding to policy-limits demands in a timely and reasonable manner.

Recommended best practices for responding to a policy limits demand include:

- Send a timely written response to every time-limit demand from plaintiff's counsel.
- Request, in writing, that plaintiff's counsel provide the defense with all materials from their file that supports the demand.
- Set forth in the response letter all steps that the insurer has taken to investigate plaintiff's claim.
- Include in the response letter all additional steps necessary to complete the evaluation of the claim.
- Identify any evidence or information in the claimant's control that is unavailable for review.
- Identify any authority that provides the carrier with additional time to respond.

Conclusion

The significant expansion of civil case mediations, brought about by the widespread use of remote audio-visual conferencing technologies and the desire to avoid the unpredictability of civil juries, has been accompanied by the plaintiff's bar increasingly utilizing aggressive settlement strategies of the type advocated by Attorney Nicholas Rowley in his book *Running with the Bulls: How to Win Top-Dollar Settlements*. Understanding, anticipating, and properly responding to plaintiff's settlement and mediation strategies will enhance the defense team's ability to neutralize or counter the impact of plaintiff's settlement negotiation and mediation game plan to better achieve desired results for the defense.