

Chapter 7

Direct Your Learning

Negotiation

After learning the content of this chapter and completing the corresponding course guide assignment, you should be able to:

- Describe the four different styles of negotiation and which style is generally best suited for use by claim representatives.
- Describe the steps in the claim negotiation process.
- Explain how claimant negotiation variables and claim representative negotiation variables affect claim negotiations.
- Describe the claim negotiation techniques that are the following:
 - Common to all parties
 - For use with unrepresented parties
 - For use with represented parties
 - Used by represented parties
- Describe the negotiation techniques claim representatives should avoid and the reasons those techniques should be avoided.
- Given a claim, identify the common pitfalls in claim negotiation and how to avoid them.
- Define or describe each of the Key Words and Phrases for this chapter.

OUTLINE

Negotiation Styles

Claim Negotiation Process

Claim Negotiation Variables

Claim Negotiation Techniques

Negotiation Techniques to Avoid

Common Pitfalls in Claim Negotiations

Summary

Develop

Develop Your Perspective

What are the main topics covered in the chapter?

Successfully concluding claims requires effective negotiation skills. Although claim representatives may use several general negotiation styles, they can follow a specific process for negotiating claims. Within that process, a variety of negotiation techniques is available, some of which are effective and useful, and some of which should be avoided. Claim representatives should also be aware of common pitfalls they can encounter during claim negotiations.

Identify critical factors in negotiating claims.

- Is there one best style of negotiation?
- What are the key differences between negotiations with unrepresented parties (claimants and insureds) and negotiations with represented parties (attorneys and public adjusters)?
- How can good selling skills contribute to effective claim negotiation?

Why is it important to learn about these topics?

Effective negotiation skills can help claim representatives resolve claims quickly and fairly to the satisfaction of the parties.

Consider the negotiation techniques commonly used in your organization.

- Which additional negotiation techniques could help you and other claim representatives reach more satisfactory claim settlements?

How can you use what you will learn?

Examine a sampling of closed claims and look for any evidence of negotiation techniques that should have been avoided or pitfalls that may have affected the claim settlement.

- What techniques could the claim representative have avoided, and what other techniques could the claim representative have used to avoid those pitfalls?

Chapter 7

Negotiation

To resolve claims successfully, claim representatives must be able to negotiate effectively. A negotiation is any discussion conducted for the purpose of producing an agreement among parties. Negotiation occurs when differences arise between the insurer, or its representative, and the insured/claimant, or the claimant's representative. (Throughout the remainder of the chapter, claimant will be used to indicate either an insured or a third-party claimant.) The negotiation may resolve a single issue and allow the claim to move forward, or it may bring about the ultimate claim resolution.

Negotiation is a part of everyday life. People negotiate when they purchase cars, homes, and major appliances. A couple may negotiate which movie to see or which restaurant to dine in. Family or household members may negotiate vacation options or who will perform various household tasks.

Whether negotiations are formal or informal, individuals usually develop negotiation styles that reflect their attitudes toward the negotiation and the other parties. Although formal negotiators may choose a predominant style, most successful negotiators can adapt to a different negotiation style as the need arises.

Although negotiation is often seen as a way of concluding a claim, it can occur during any part of the claim process. For the claimant, the negotiation process includes the following three phases:

1. The crisis phase begins when a loss occurs. At that point, most people do not immediately consider the potential outcomes but are instead dealing with the immediacy of the loss and the desire to recover from the loss as quickly as possible.
2. The motivation phase begins when the insured recognizes the financial implications of the loss and starts to think about who will pay for the loss. As this motivational transition occurs, the claimant may begin to view the insurer as an adversary. Some claimants may consider exaggerating the claim or engaging in other forms of soft fraud. Ideally, during this phase, parties should work to establish rapport with each other.
3. The bargaining phase begins when the parties enter into serious settlement discussions. Parties arrive at this phase with preconceived notions and impressions developed in the earlier phases. During the bargaining phase,

the parties share their evaluations of the claim and determine any differences. Disagreements may erode any rapport previously established between parties. In successful negotiations, the parties resolve their differences and the claim is settled during this phase.

Negotiation skills are particularly important to claim representatives as a part of good-faith claim handling. Many claims do not have a set dollar value, and reasonable people can differ considerably in their opinions of claim values. Any part of a claim is negotiable, so no finite answer or value exists. The following are some examples of negotiated aspects of a claim:

- Damages in a bodily injury liability claim
- Percentage of comparative negligence attributable to the parties in any type of claim
- Amount of depreciation on a car or a piece of furniture
- Amount of lost sales in a business income claim
- Amount of recovery from the party responsible for an accident
- Payment arrangements with the uninsured responsible party in any type of claim

An examination of the four negotiation styles provides a framework for understanding negotiations and the parties who negotiate.

NEGOTIATION STYLES

Negotiators may use four distinct negotiation styles, commonly referred to as win-win, win-lose, lose-win, and lose-lose. These styles, shown in Exhibit 7-1, are derived from a negotiator's degree of concern for obtaining the best outcome relative to his or her ability to achieve rapport. Claim representatives should adopt a negotiation style appropriate to the claim and the parties involved.

Individuals who have no clear dominant style may typically compromise in negotiations. For example, a negotiator who prefers compromise settlements may suggest that the two parties split the difference or may offer to increase a proposed settlement if the other party decreases the demand. Compromise is not a style of negotiation; rather, it is the lack of a clear, dominant style.

Effective claim negotiators engage in activities and exhibit traits that demonstrate concern for obtaining the best outcome, and they are skilled in achieving rapport. The following qualities are important to claim representatives seeking to obtain the best outcome:

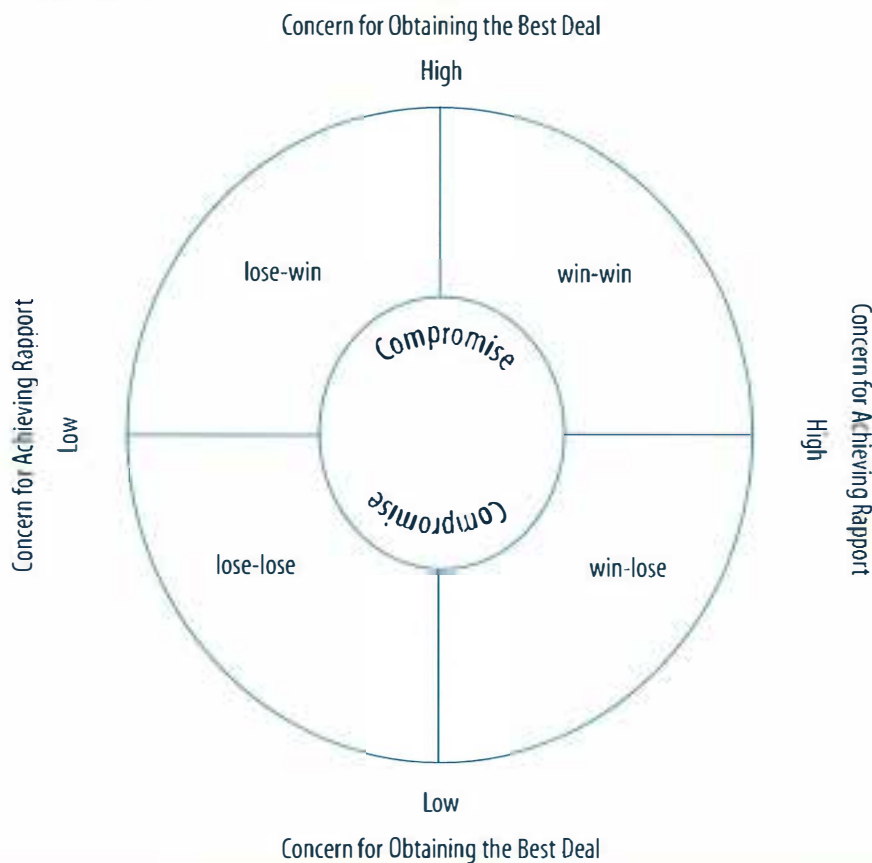
- Thorough knowledge of the claim file
- Persistence
- Firmness, coupled with fairness
- Thorough evaluation of the claim

The following qualities contribute to rapport in a claim negotiation:

- Good listening skills
- Humor
- Empathy
- Friendliness

EXHIBIT 7-1

Negotiation



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Most good negotiators have an integrated style of negotiation that simultaneously seeks to obtain the best outcome and build rapport with the other party. A claim representative may focus on obtaining the best outcome in one phase of the negotiation process and, at another phase, may find that achieving rapport is more important in seeking a successful claim settlement. The integrated style gives the claim representative flexibility to shift focus depending on the circumstances and the claimant's needs and reduce the potential for conflict.

In claims, obtaining the best outcome does not mean taking advantage of the other party, settling for an unusually low amount, or providing an otherwise unfair settlement. Obtaining the best outcome means arriving at a settlement that is favorable to the insurer but that is considered equitable and fair by the other party. Negotiating parties seeking to obtain the best outcome may use a more direct negotiating style and may be less likely to make concessions than when they are working to build rapport.

Claim representatives may often negotiate with the same parties on different claims; they may be insureds, salvage buyers, or lawyers, for example. Impressions from prior negotiations can influence the outcome of current negotiations. In this situation, the claim representative may be more concerned with building rapport than with obtaining the best outcome and may, therefore, use a less aggressive, more cooperative negotiating style.

With an awareness of the various negotiating styles, claim representatives can select and adapt the style that will contribute most to a successful settlement in each case.

Win-Win

A claim representative using the win-win negotiation style seeks both to obtain the best outcome and to achieve rapport with the other party, resulting in a settlement that is satisfying to all parties. Win-win negotiators are simultaneously assertive and cooperative. They approach disagreements not as destructive or as conflicts but as tools to better understand the other party's wants and needs.

The following examples show how alternative repair proposals in property claims can be used in win-win negotiations:

- An insured scorched her Formica counter top when she placed a hot pan on the counter. The undamaged part of the two-year-old counter top is in good condition. Matching the Formica for a section repair is impossible because the particular pattern is no longer made. The insured expects that a repair will entail removing all the kitchen counter tops and replacing them with similar grade of Formica.

Win-win solution—Because the kitchen counters are otherwise in good condition, the claim representative offers to replace the damaged section of the counter with a built-in cutting board that will also serve as a hot pad for hot items from the stove. The claim representative may even offer to waive the insured's deductible as an added incentive to proceed with this repair.

- Lightning strikes an insured's business office and damages the two-year-old telephone system, rendering it unusable. Because the telephone system is one of the insured's primary marketing tools, it must be replaced as soon as possible.

Win-win solution—Noting that it may be hard to locate the same make and model of equipment to replace the phone system, the claim representative offers to replace the system with a readily available newer model that has the same features, plus some enhancements. The insured will receive the phone system quickly and will benefit from an up-to-date system with additional features. The insurer will save not only the time it would have taken to replace the old system, but also costs because technological advances have resulted in lower prices for phone equipment.

Win-win negotiations can also occur in automobile physical damage claims, as the following example illustrates:

- The insured is driving her car when she strikes a large rock in the road, cracking the oil pan and causing an oil leak. As she continues to drive, the engine overheats and is damaged beyond repair. The car is four years old and has about 65,000 miles on it. A new engine will cost about \$6,000. The insured's Personal Auto Policy, which has a \$500 deductible, uses actual cash value (ACV, meaning the replacement cost less reasonable depreciation) as the valuation basis for a loss. Assuming that the car engine has a useful life-span of 130,000 miles, the ACV of the engine would be 50 percent of the cost of a new engine, or \$3,000. Half the engine's useful life has been used, so the insurer reduces the loss amount by 50 percent to allow for depreciation. With the deductible of \$500, the net settlement amount is \$2,500, leaving the insured to pay the remaining \$3,500 for the new engine.

Win-win solution—The claim representative offers to replace the engine with a used engine of like kind and quality (LKQ) from a local salvage yard. Most repair shops provide a minor warranty on used auto parts. If the insurer has a direct repair program (DRP), and directs the claimant to a specific repair facility, most states' fair claims regulations require the insurer to guarantee the work. This solution eliminates the depreciation deduction and provides the insured with some warranty on the work performed.

Win-win negotiations may also be used in liability or workers' compensation claims. The following example is of a liability claim, but a similar approach can be used in workers' compensation claims:

- A six-year-old neighbor girl is playing with the insured's dog when the dog tries to grab a cap from the girl's head. One of the dog's teeth scrapes the girl's forehead causing a cut that requires twenty stitches. Although the dog is not known to be vicious, a law in this state creates strict liability (meaning liability regardless of negligence or intent) on the part of the dog owners in such cases. About a year after the injury, the scar has healed fairly well and no plastic surgery is anticipated. The claim representative is aware that injury claims involving unmarried females with facial scarring usually settle at high dollar amounts.

Win-win solution—During negotiation, the claim representative asks the parents whether they want their daughter to attend college. Both parents say they do but express concerns about their ability to pay for a college education. The claim representative suggests a structured settlement that will pay equal sums to the claimant during her four college years between ages eighteen and twenty-one. Such a settlement will have to be approved by a judge, he explains. An advantage of the settlement is that the daughter would be receiving the payments in the year she would spend them. If, instead, the family was to receive a lump sum payment, they might invest it for their daughter's education; consequently, they would have to pay taxes on the investment income, if any, and there would be no guarantee that the investment would not be lost. The claim representative may be able to negotiate a settlement that will cost less than a lump-sum settlement, so the insurer would benefit as well.

Another example of a win-win negotiation is the offer to settle a claim with a release that allows future payments for a claimant who may need additional treatment. The claimant receives immediate funds, and the insurer agrees that, if the claimant decides to have further treatment (such as plastic surgery), the insurer will pay up to a specified amount within a specified time after the claimant completes the treatment.

Although a claimant may decline a win-win offer, the claim representative who seeks a win-win settlement, at the very least, demonstrates an interest in resolving the claim to the claimant's satisfaction and may help build rapport as negotiations continue.

Win-Lose

Negotiators who use a win-lose style see negotiation as a contest between two opposing parties, each seeking to defeat the other. The parties' greatest concern is obtaining the best outcome for their side. They have little interest in achieving rapport with the other party. Negotiators may use this style of negotiation when other avenues of resolution have been exhausted, such as when a lawsuit has been filed and a trial is approaching. At that point, any rapport between parties has eroded because the settlement amount will ultimately be determined by the party that presents the best case to the judge and jury.

Claim representatives may use the win-lose style of negotiation in resolving claims that appear to involve fraud. While claim representatives must always act in good faith in all aspects of claim handling, they may be less concerned with achieving rapport with people they suspect of trying to defraud the insurer.

When fraud is suspected, insurers may require a formal proof of loss from the insured, followed by an examination of the insured under oath. Imposing these requirements does nothing to build rapport; however, this confrontational win-lose negotiation style can serve the insurer's need to prove or disprove suspected fraud.

Lose-Win

A negotiator using the lose-win style of negotiation is primarily concerned with achieving rapport with the other party; obtaining the best outcome is a low priority. This approach may sometimes result in a more expedient and more cost-effective settlement than other approaches. Generally, the lose-win style is best used when it is highly likely that the other party will hire an attorney or other representative to help resolve the issue.

The following examples illustrate the use of the lose-win negotiation style:

- The claimant is injured in an automobile accident with the insured, and the claimant's vehicle is not drivable. The claimant had no medical insurance. Assuming the insured is liable, the claim representative may offer to pay the claimant directly for a rental so that the claimant does not have to use his own money to rent the car and then submit the bills to the insurer for reimbursement.
- The insured's home is destroyed by fire, forcing the insured to stay in a hotel. The claim representative may offer the insured advance payment of part of the additional living expense claim while the claim investigation is pending rather than waiting until the entire claim can be resolved.

While the lose-win style initially meets the needs of the claimant, the insurer often achieves an equitable settlement in the long run because the claim representative began by engaging in rapport-building activities. Such activities may also shorten the amount of time that the claim is open.

Lose-Lose

A negotiator who has little concern either for obtaining the best outcome or for achieving rapport may be using a lose-lose negotiation style. The negotiator may focus on a fast resolution without considering the other party's specific wants or needs. Used in claim negotiation, this approach can result in inequitable treatment of claimants and insureds. To avoid any inequity and potential bad faith actions, claim representatives should normally avoid this negotiation style.

Claim representatives who use a lose-lose style may be trying to avoid confrontational settlement negotiations. They may give in to demanding claimants and settle claims more quickly than they would with less demanding claimants.

Occasionally, the lose-lose negotiation style cannot be avoided in claim settlement. For example, some claimants offer unrealistic demands in negotiation and may not understand the logic of the claim representative's offer. Any explanation the claim representative offers only irritates the claimant. As a result, the claimant withdraws from the negotiation process and hires a public adjuster or a lawyer to continue the negotiations. Ultimately, the involvement of a third party will prolong resolution of the claim and result in less money for the claimant.

The following is an example of the use of the lose-lose negotiation style:

- A small kitchen fire has damaged some of the insured's personal property and left a smoky residue and a persistent foul odor in the room. The claim representative offers to settle with the insured for the cost to replace the personal property and the curtains and to pay a restoration firm to clean the residue from the ceiling. The insured is satisfied with the payment for the damaged property but demands complete replacement of the ceiling material. The claim representative explains that replacement of the material is more costly than cleaning and suggests that the cleaning be completed, and if it is not satisfactory, then the insurer will replace the ceiling. The insured persists with the demand that the ceiling be replaced.

Lose-lose solution—The claim representative withdraws from settlement negotiations to give the insured time to consider the offer. The insured hires a public adjuster to handle the case on his behalf. The public adjuster charges a fee that, when subtracted from the final settlement amount, would reduce that amount to less than the cost to hire a restoration firm to clean the ceiling. The insured cancels the property policy. The result is that the insurer pays for the replacement of the ceiling material and the insured pays more of his own money for the repair than he would have had he accepted the initial offer. Both the insurer and the insured lose from this negotiation.

Claim representatives should choose the style that is appropriate based on the circumstances of a given negotiation, or they can integrate several styles as appropriate. The negotiation process generally involves several steps, and claim representatives can tailor the process to particular claims. The next section describes the steps of the negotiation process.

CLAIM NEGOTIATION PROCESS

Generally, all negotiators follow a process that breaks down into the following four steps:

1. Prepare
2. Develop and evaluate alternative outcomes
3. Identify and evaluate each party's interests
4. Make concessions and create appropriate resolutions

By being aware of and thoroughly completing each step, claim representatives can work towards more effective negotiations. The following descriptions apply these steps specifically to claim negotiations.

The first step of the negotiation process—preparation—begins long before the negotiation itself begins. For a claim representative, the process begins when the claim is assigned. The claim representative assembles information about the claimant's lifestyle, expectations, preferences, and likely behavior;

any previous claims handled by the current insurer or other insurers and their outcomes; and any information about the claimant's history that may be useful in the negotiation. For a commercial insured, the claim representative may assemble information about the claimant's business or employment policies, its supply contracts, and even its competitors. During this step, the claim representative also begins establishing rapport with the claimant.

In the second step of the negotiation process, both parties identify the settlement alternatives they consider appropriate and present the reasons why they are appropriate. The party with the greatest number of acceptable alternatives usually has the most leverage in the negotiation because the various alternatives can be used in making concessions that lead to satisfactory settlements.

To develop settlement alternatives, each party must identify the minimum and maximum dollar amounts acceptable for a claim resolution. Answering the questions in the box can help the negotiating parties establish these amounts.

Claim Representative	Other Party (Claimant)
What is the minimum amount I should accept for this claim in good faith?	What is the maximum amount I can demand without appearing outrageous?
What is the maximum amount for which I am willing to settle this claim?	What is the maximum amount the other party might pay for this claim?
What is the maximum amount the other party might demand for this claim without appearing outrageous?	What is the minimum amount the other party might pay for this claim without appearing outrageous?
What is the minimum amount the other party might be willing to accept for this claim?	What is the minimum amount I might be willing to accept for this claim?
What amount should I use for my starting offer?	

Source: Judith Gordon, *Organizational Behavior: A Diagnostic Approach*, Upper Saddle River, N.J.: Pearson Education, Inc., 2002), pp. 336–337.

The values determined through the answers to the minimum and maximum questions can be used to develop a best alternative to a negotiated agreement (BATNA). A BATNA is a standard against which a negotiator can measure any proposed agreement. It can help a negotiator avoid accepting unfavorable terms and rejecting favorable terms.¹ Stated simply, a BATNA is the choice a negotiator can make if the negotiation direction seems unlikely to result in a favorable outcome. If the BATNA is better than the likely outcome of the negotiation, the negotiator can walk away.

To determine the best alternative, the claim representative should consider the costs of the BATNA as well as the likely outcome. Any offers can then be compared against the cost of the BATNA. If an offer is less costly than the BATNA, the claim representative should seriously consider the offer. If the offer is greater than the BATNA, the claim representative should reject it.

The claim representative should also consider the claimant's likely BATNA and should compare the insurer's offers against it. For example, the claimant's BATNA may be the net outcome (after legal costs) likely from litigation. The claim representative should estimate the likelihood that the claimant will file a lawsuit based on information from the investigation. If the claimant suggests that a lawsuit would render a better settlement, then the claim representative, while acknowledging the claimant's right to file a lawsuit, should point out the legal costs that would reduce the settlement amount. If the claim representative's offer for a negotiated settlement is greater than the claimant's BATNA, then the claimant would be more likely to accept the offer.

In the third step of the negotiation process, each party's interests are identified. These interests can be based on essential needs, socialization needs, personal needs, or organizational needs. For example, an injured person's needs may include ongoing medical treatment, hospice care, income continuation, rehabilitation, social interaction, and financial provisions for dependents. A family's needs after a property loss can include temporary housing, food, clothing and personal necessities, toys or other entertainment, and allowance for public transportation of children to school. An organization's needs can relate to its reputation, relationships with its customers, organizational goals, and income.

Interests can be tangible, such as housing, or intangible, such as reputation, fairness, and socialization needs. Interests can be also subjective, that is, based on the claimant's perceptions. A claimant's interests can change intentionally or unintentionally during the claim settlement period.

In the final step of the negotiation process, successful negotiators recognize the need to make concessions to create appropriate resolutions. Concessions are trade-offs. For example, a claim representative may offer to increase the claim amount by \$2,000 if the claimant agrees to concede on \$4,000 worth of personal property reported stolen but for which the claimant has no proof of ownership. The settlement, then, would pay for fifty percent of the reported value of the allegedly stolen property.

Negotiators can assess prospective concessions by considering the best and worst possible claim resolutions for each party. They can examine the effect a concession would have on the claim resolution, and then they can determine whether the resulting claim resolution would better serve the interests of the claimant and the insurer. The parties' perceived value of the concessions may vary, as in the following example: An old vehicle is a total loss after an auto accident. The claimant, who repairs auto body damage as a hobby, values the car for sentimental reasons. As a concession, the claim representative offers to allow the insured to keep the damaged vehicle with a salvage title. If the insurer instead were to pay for a replacement vehicle, the claimant would have to pay sales tax on it. This concession can lead to a win-win resolution: the insured wins because he can keep a beloved car, and the insurer wins because it pays the value less the salvage to the claimant. The insurer also saves by not having to dispose of the salvage.

In another example of concessions that can lead to win-win resolutions, a tornado tears the roof off a school, and most of the school's computers are damaged by the building's sprinkler system or rain. The claim representative offers to replace the mismatched older computers and printers with equipment of similar makes, models, and software configurations, including some refurbished computers and printers, along with refurbished network hardware and software. The insurer benefits from the convenience of getting all the equipment from one source and by receiving discounts for volume purchases and refurbished equipment. The school benefits from new, updated equipment and compatibility to enable better networking capability.

Successful claim resolution requires reviewing all the needs of both the claimant and the insurer to determine an optimum resolution for both parties. Options such as refurbished or used equipment, like-kind auto parts, and structured settlements can be negotiating tools for developing mutually satisfying claim resolutions.

Throughout the claim negotiation process, claim representatives must consider claim negotiation variables that affect their choice of negotiation style and the outcome of the negotiation.

CLAIM NEGOTIATION VARIABLES

Claim negotiation differs from many other types of negotiation. Claim negotiation often focuses primarily on the amount of money the insurer will pay for the claim. Other negotiations may involve a variety of negotiating variables. For example, negotiating variables for a homeowner seeking bids from contractors to replace an aging roof may include price, discount for cash payment, quality of materials, work start date, and work completion date.

If the roof requires replacement because of windstorm damage rather than age, the insured and claim representative usually negotiate only the loss amount; however, other variables may be negotiated. No two claim negotiations are exactly the same. The facts of two different losses may be similar, but the characteristics of the negotiation and the parties, as well as the outcome, can be dramatically affected by many negotiation variables. Claim negotiation variables may be distinguished between the claimant's variables and the claim representative's variables.

Claimant's Negotiation Variables

The variables the claimant brings into the negotiation influence the claim representative's choice of negotiation techniques and strategies. For the claimant, the most significant negotiation variables can include the following:

- Which phase of negotiation the claimant is in
- Claimant's financial needs
- Time pressures that the claimant may face

- Claimant's emotional reaction to the loss
- Claimant's experience with or knowledge of insurance claims
- Claimant's personality

The following sections explain these variables and how they affect the claim representative's negotiating behaviors and the outcome of the negotiation.

Claimant's Negotiation Phase

As described previously, claimants experience three phases during the negotiation process: the crisis phase, the motivation phase, and the bargaining phase. The claim representative does not become involved until the second phase. Understanding these phases can help the claim representative respond appropriately, resulting in smoother negotiations and contributing to successful claim settlements.

Crisis Phase—During the crisis phase, most claimants are primarily concerned with returning to normal. Although the claim representative does not become involved until later, understanding the claimant's experiences during this phase can help the claim representative work with the claimant in the remaining negotiation phases. The following examples suggest some thoughts a claimant may have immediately following a loss:

- The insured's thirty-five gallon fish tank ruptures in his living room at 2:00 AM on Sunday morning.
 - Can the fish be saved?
 - How will I clean up this mess?
 - How much will it cost to replace the ruined wall-to-wall carpeting?
- The claimant's new car is hit by an insured making a left turn at an intersection. The claimant has the right of way. Although nobody is injured, the claimant's car is not drivable and must be towed from the scene.
 - Who will pay for the damage to my car?
 - Who will repair my car?
 - How long will it take to get my car repaired?
 - How will I get to work while my car is being repaired?

In these examples, the claimants are motivated by a desire for life to be normal again rather than by the money they might make through the claim settlement process. As the claimant's desire for normalcy shifts to finding ways to return to normal, the motivation phase begins.

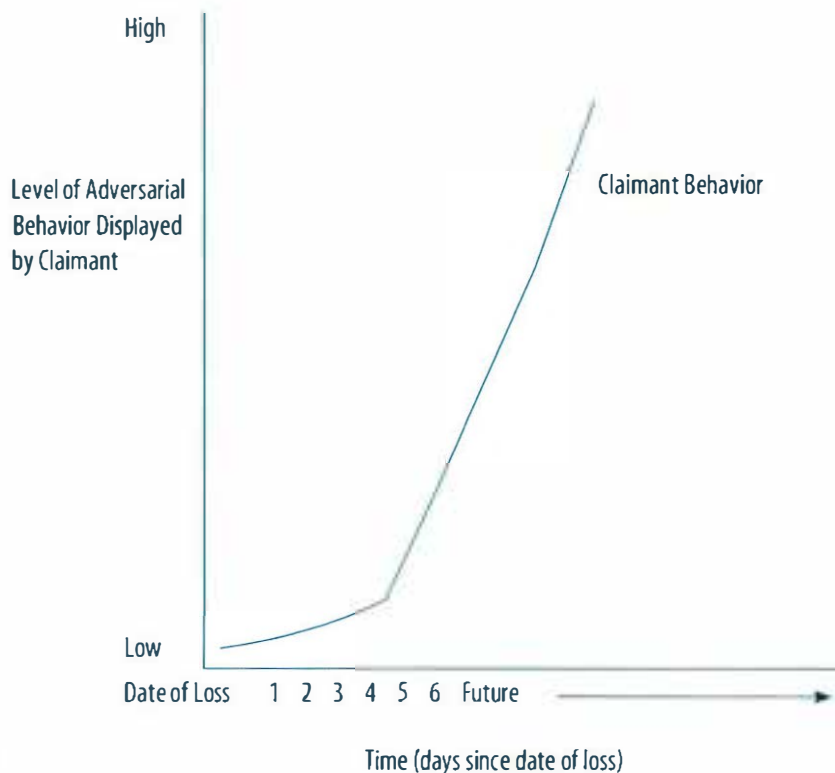
Motivation Phase—During the motivation phase of the negotiation process, the claimant recognizes that life will not be normal unless someone pays for damage. During this phase, the claimant files an insurance claim to seek payment for the damages. A quick response at this stage can establish the claim representative as an ally who will help the claimant return to normalcy as soon as possible. A quick response can also help establish the insurer's credibility.

Conversely, if the claim representative does not respond quickly enough after the claim is filed, the claimant may begin to view the insurer as an adversary that is delaying the return to normalcy.

When a claimant experiencing a crisis feels ignored by the insurer, he or she may begin to exhibit adversarial, and sometimes illegal, behavior, such as inflating the claim or engaging in other forms of soft fraud. This shift in claimant motivation is directly related to the time it takes the claim representative to contact the claimant, as illustrated in Exhibit 7-2.

EXHIBIT 7-2

Relationship Between Client Behavior and Claim Representative's First Contact



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A claimant's adversarial behavior may lead a claim representative to pay more for the claim than the insurer would otherwise pay. Because prompt contact with the claimant can prevent such behavior, most insurers adopt contact standards that are more stringent than statutory legal requirements, which may allow up to ten days for an insurer to contact a claimant. Insurers recognize that prompt contact is a customer service issue that can directly influence the amount of a claim settlement.

A claim representative begins to establish rapport with a claimant from the first meeting. The first impression in the motivation phase of the negotiation affects the entire negotiation process.

Bargaining Phase—Negotiating parties carry all their preconceived notions, impressions, and perceptions into serious settlement discussions during the bargaining phase. A claimant brings his or her impressions of the claim representative and the insurer that have developed during the previous negotiation phases. During the bargaining phase, parties share their evaluations of the claim and determine any differences. Disagreements may arise, and any rapport previously built between the parties can disintegrate. In successful negotiations, the parties resolve their differences and settle the claim.

If the claim representative and the claimant do not communicate well or establish rapport during the earlier phases of the negotiation process, the bargaining phase may become adversarial. However, a smooth bargaining phase is not guaranteed even if the parties develop rapport during the earlier phases.

How Badly the Claimant Needs Money

A claimant's need for money in order to return to normal is a major variable that determines how the claim representative should approach negotiations with the claimant. The claim representative can use a claimant's financial need to encourage an early and reasonable claim settlement. A claimant may respond readily to a reasonable settlement offer that promises prompt settlement rather than delaying payment by seeking a greater settlement amount. Conversely, a claimant who has money or property available to meet temporary needs while the damaged property is being repaired or replaced may delay settlement. For example, a claimant who has a rental vehicle for use while his or her primary vehicle is being repaired may be slow to seek repair estimates and complete the necessary repairs, thus postponing the claim negotiation and settlement. To encourage a timely settlement, the claim representative may need to appeal to another of the claimant's needs.

Time Pressures That the Claimant May Face

Claim representatives should be aware of any time pressures the claimant faces, such as due dates on bills. Other examples of time pressures may include the claimant's desire to repair a damaged home before an approaching holiday or to repair an automobile for a daughter to use at college before the term begins.

Knowing of such time pressures, the claim representative can combine a reasonable offer with a promise of prompt payment to encourage the claimant to negotiate a claim settlement.

Claimant's Emotional Reaction to the Loss

The claim representative should allow the claimant to express the fears, concerns, frustrations, and needs evoked by the loss. Empathizing with the claimant can help establish rapport.

Sometimes claimants will direct their emotions at the claim representative with angry reactions or criticism. Such reactions should not be considered personal attacks. By maintaining flexibility and a professional demeanor, the claim representative can use any differences with the claimant to help find a satisfactory resolution for the insurer and the claimant. For example, if the claimant expresses a distrust of the insurer or the claim representative, the claim representative could regain some trust by making a prompt and reasonable offer for an advance payment that would be credited to the ultimate claim settlement.

Claimant's Experience With or Knowledge of Insurance Claims

The claimant's experience with or knowledge of insurance claims is a variable that can significantly affect the claim outcome. Claim representatives should ask claimants at the first contact whether they have ever filed a claim. The answer to this question helps the claim representative determine the claimant's experience in filing insurance claims and may provide clues to the claimant's motivation and how the claim will proceed. The claimant may respond with a variety of answers. For example, a claimant's asking why the claim representative wants to know about previous claims could indicate distrust of the insurer. The claim representative may respond that many people do not understand the claim process or have had a bad experience with it and proceed to describe how the claim handling process will help the claimant return to normalcy as soon as possible. In other cases, a claimant's previous bad claim experience may color his or her feelings about the present claim, and the claimant may worry that the payment in the current claim will not be sufficient to repair the damage. To counter this concern, the claim representative can differentiate the insurer's claim service from the service the claimant experienced previously and again emphasize the insurer's intention to meet the claimant's needs.

A claimant may know about insurance claims without having had personal experience with them. For example, the claimant may work for an insurer or a producer. If so, the claim representative may appeal to the claimant's knowledge in explaining the claim process and emphasizing the intention to reach a prompt and reasonable claim settlement.

Claimant's Personality

A claimant's personality can have a significant effect on negotiations. If the claimant is self-assured and easy-going, the claim representative may be able to establish rapport and resolve the claim quickly and satisfactorily. However, claimants may be insecure or distrustful of businesses or may be arrogant or aggressive. In responding to personality traits that can complicate negotiations, claim representatives can use empathy and patience and make continuing efforts to establish rapport.

The claim representative must be aware of the claimant's negotiation variables to develop creative claim resolutions but must also consider his or her own negotiation variables.

Claim Representative's Negotiation Variables

Negotiation variables for claim representatives can differ from the negotiation variables for claimants, but the two parties can be affected by common variables. The following are some of the most significant negotiation variables that can affect claim representatives:

- Claim representative's knowledge of the claim
- Claim representative's authority level
- Number of alternatives available for a satisfactory claim settlement
- Claim representative's time factors
- Negotiation settings
- Claim representative's personality

Because of the number of variables in a negotiation, no right way exists for claim representatives to conduct all negotiations. They cannot apply formulas that will produce successful claim resolutions the same way formulas can be applied to math problems. Negotiation strategies and tactics can vary based on the relative importance of the negotiation variables and the claim representative's ability to influence the variables. For example, claim representatives can ensure their own thorough knowledge of the claim and can influence the claim negotiation setting.

Claim Representative's Knowledge of the Claim

The claim representative's knowledge of the claim is one of the most significant negotiation variables. The more the claim representative knows about the loss details, the parties, and the results of the claim investigation, the better prepared he or she is to negotiate a satisfactory claim settlement based on the merits of the claim. Conversely, the claim representative's lack of knowledge of the claim can be a severe detriment to the claim negotiation.

Claim Representative's Authority Level

The claim representative's authority level is another crucial negotiating variable. Before beginning claim negotiations, the claim representative should be given sufficient authority to settle the claim up to its estimated maximum value. If the claim representative lacks sufficient authority, the claimant would be justified in seeking to negotiate with the claim representative's supervisor or someone with more negotiating authority. Delegating a claim representative adequate negotiating authority demonstrates an insurer's good faith.

Number of Alternatives Available for a Satisfactory Claim Settlement

Another variable that can significantly affect the negotiation is the number of alternatives available to the claim representative for a satisfactory claim settlement. Before reaching the bargaining phase, the claim representative

should apply his or her knowledge of the claim and the claimant to devise as many settlement alternatives as possible. For example, if an insured's heirloom diamond necklace was stolen, but the matching bracelet and earrings were not, several alternatives may be available for settling this claim. Depending on the policy coverages, the claim representative could propose one of the following alternatives as a settlement offer:

- Replace the entire set with a set of like kind and value
- Replace only the necklace with one of like kind and value, matching the other pieces of the set as closely as possible
- Replace only the necklace with an exact match if one can be obtained through special replacement services available to insurers
- Pay the insured for the value of the necklace and allow the insured to keep the bracelet and earrings
- Pay the insured for the full value of the set and collect the bracelet and earrings to sell for salvage recovery

Any of these alternatives would achieve a satisfactory resolution for the insurer; the claimant's choice of alternatives is determined by the value of the set as a family heirloom.

In some cases, claim representatives can combine certain alternatives to best meet the claimant's needs. Some alternatives might cost the insurer very little but could be valuable to the claimant, and these alternatives could be added to other alternatives to create a more attractive settlement offer for the claimant.

Claim Representative's Time Factors

Claim representatives face time factors that are prompted by claim work in general. Time factors may be imposed by a claim manager or by department guidelines, by the insurer or a reinsurer, or by insurance regulators and state laws. These time factors become negotiation variables for the claim representative. The claim representative's caseload is also a variable because it determines the amount of time available to devote to any particular claim. A claim representative who faces deadlines in negotiating a settlement may be more flexible in accepting the claimant's demands and may take less time exploring alternative settlement options than one who has no deadlines.

As with claimant time factors, the claim representative's personal schedule can also influence the negotiation. For example, a claim representative preparing to take a two-week vacation may be eager to settle a claim before the trip. Or the claim representative's assignment to catastrophe duty for the next few months could become a variable in the negotiation process. Any factor that may prompt the claim representative to settle the claim more rapidly or to reduce the time devoted to the bargaining step in the negotiation process is a negotiation variable.

Claim Negotiation Settings

Many claims are settled entirely by telephone or by Internet tools and communication; the claim representative and the claimant may never meet in person. Although negotiating by telephone and the Internet is efficient and effective for most claim settlements, claim representatives may find that certain claims are better negotiated in person.

This section examines negotiation in the following settings:

- In-person negotiation
- Telephone negotiation
- Internet negotiation

In-person negotiation provides many advantages over other negotiation settings. Judges may require claim representatives to attend settlement conferences. Claims are often mediated in person, and claim representatives sometimes meet with unrepresented claimants to settle claims.

When people communicate in person, three channels of communication are available to them: words, tone, and body language. Of these three, the words used by one party may be the least significant aspect of communication. In face-to-face communication, words usually convey less of the total communication than any other aspect. The tone of voice is often far more significant than the words. However, the major component of face-to-face communication may be body language. When a person's words, tone, and body language appear in conflict, body language usually conveys the communicator's true meaning.

Personal appearance may offer the claim representative information about the claimant's economic status, education, and personal life. This information can be helpful in assessing the claimant's potential credibility at trial if the claim results in litigation. A potential disadvantage of in-person negotiation is that the claimant can observe the claim representative's body language and appearance and form an opinion of the claim representative's credibility as well.

In-person negotiation may also offer claim representatives the opportunity to take advantage of a group dynamic. When faced with the opinions of a claim representative, a defense attorney, and a judge or mediator, all advocating a particular settlement, the claimant may more readily agree. Conversely, if the claim representative suggests a lesser settlement than the other parties support, the group dynamic could be a disadvantage.

Another advantage of in-person negotiation relates to physical evidence. When the claim representative and the claimant see evidence such as photos or diagrams of the accident scene or visible scarring, they may change their opinions of the claim's value.

Claim representatives should follow some basic rules when conducting in-person negotiation, including the following:

- Arrive early or on time. Punctuality helps create a positive impression of the claim representative as someone who is organized and dedicated to settling the claim. It also presents a positive image of the insurer.
- When possible, become familiar with the negotiation site. When people are comfortable with their surroundings, their confidence generally increases. By spending a few minutes alone at the site, a claim representative can become familiar with any potential distractions so that when negotiation begins, he or she can concentrate on the negotiation itself.
- Do not bring the claim file to the negotiation. Claim files usually contain sensitive information, such as the claim reserve or extent of settlement authority. A claim representative should take only needed documents, such as physicians' reports and damage appraisals, to the negotiation.
- Be aware of the number of opposing negotiators. Generally, the party with the greater number of negotiators has an advantage. For example, before negotiations at a claimant's attorney's office, the claimant's attorney may ask if one or more associates may observe the negotiation. This move may be a ploy to add people to the party's negotiation team in order to outnumber the claim representative. The claim representative may object to the presence of additional people or may want to clarify the observer's role at the beginning of the negotiation. If an observer becomes involved in the negotiation, the other party has an opportunity to think and regroup or revise strategy. The lone claim representative has no such advantage. When faced with an unavoidable situation of being outnumbered, the claim representative should take as much time as needed to formulate answers to questions.
- When given the opportunity to choose a seating arrangement, the claim representative should choose a seat at the head of the table, which is considered a position of authority.

For reasons of convenience and efficiency, many claim negotiations are conducted by telephone. Telephone negotiators must rely on words and tone to communicate their messages. Without the body language component of communication, the parties are more likely to misunderstand each other. Active listening skills are useful to clarify the other party's meaning and avoid misunderstandings. With active listening, the claim representative periodically paraphrases the other party's communication. For example, the claim representative could say, "From our discussion, Mr. Brown, I understand that you are satisfied with the amount of the settlement we have offered for your totaled car, but we disagree on the value of contents of your car that were also damaged. Is that correct?"

Telephone negotiations are generally quicker and more convenient than in-person negotiations. Telephone conversations are usually shorter than the same conversation would be in person because the parties tend to get to the point more quickly and avoid casual conversation that often occurs in person. Nevertheless, even in telephone negotiations, claim representatives should take the time to develop rapport with the other party through some casual conversation.

Parties' behavior in telephone conversations differs from that in in-person conversations in several other ways. For example, the parties to a telephone conversation are more likely to compete with each other. Also, when people are unable to see one another, they may say things they would not say if they were communicating in person. These behaviors may create conflict during a negotiation.

While conducting telephone negotiations, claim representatives should be aware of their tone of voice. Absent body language, parties depend on vocal tone (the qualities of the sound of the voice). For example, if a person smiles while speaking, vocal tone tends to be pleasant and to convey a positive impression of the speaker.

In telephone negotiations, the party who places the call has the advantage of understanding what he or she wants to accomplish. A claim representative who is the receiver of a negotiation call has an immediate disadvantage because the other party has reviewed the facts and planned the call. Call initiators can also use the element of surprise to their advantage. If caught off guard, a claim representative may inappropriately yield to demands. Upon receiving an unexpected call from the other negotiating party, a claim representative should postpone the negotiation by offering to review the file and return the call at a mutually agreeable time. A return call gives the claim representative more control, and when a call is scheduled with the other party, both parties can prepare for a productive negotiation.

Internet negotiation, a third negotiation setting, adds another aspect to the negotiation. Internet systems of negotiation vary; however, they often offer some form of blind bidding process in which neither party knows the other party's offer or counteroffer. Some systems use a percentage of each offer and counteroffer to indicate an acceptable range; the counteroffer must be within the range established by the percentage. More complex systems allow parties to set priorities on some of the negotiating variables, such as the time to settle, the amount of the settlement, or the language of the settlement. These systems are designed to deliver an equitable settlement based on the positions of the parties in dispute.

Some vendors of these Internet systems incorporate the use of a live facilitator who can help the parties through the process. The facilitator summarizes the shared information but does not reveal the parties' offers or counteroffers.

Other systems offer a telephone facilitator. Some of these Internet companies also offer Internet mediation and arbitration services that may be initiated if the Internet negotiation fails to settle the claim.

The Internet systems' blind bidding removes the personalities from the negotiation process; body language, tone of voice, and rapport are no longer involved. These systems compare the negotiation figures submitted by both parties and use them to attempt to settle. For example, with one system, after completing an evaluation of the claim, the party making the offer (a claim representative) enters three acceptable offers. The party making a blind counteroffer (the claimant or the claimant's attorney) is notified of the offer via several methods (e-mail, fax, letter, and telephone) and then enters a counteroffer. If the claimant's demand is less than or equal to the claim representative's offer, the software calculates a median amount (the amount that is half the difference between the two amounts, added to the lesser amount) and declares the matter settled at that figure. If the claimant's demand is greater than the claim representative's offer, the claim representative can enter a new counteroffer that is compared against the claimant's original demand. The claimant can then make a new counterdemand against the claim representative's second offer. If the process does not result in a settlement, the offering party can start over with new offers or use some other form of settlement. Often the result is a much faster claim resolution (within days rather than months to years) with significantly lower legal costs. The fee for using the system is generally lower than the costs of litigation.

Only certain types of claims are good candidates for Internet negotiations. These systems are generally used in uncomplicated bodily injury claims when parties are primarily negotiating the value of the claim. They are not used in claims involving coverage issues or disputed liability because of the number of negotiation variables and alternatives in such claims.

Internet negotiation systems benefit insurers by making negotiations easier, less stressful, and less time-consuming for their staffs and by reducing legal costs. Such systems benefit claimants by reaching rapid settlement, providing funds to meet immediate financial needs and by eliminating the stress of the negotiation process.

Claim Representative's Personality

The claim representative's personality is another variable that can influence the negotiation. If a claim representative is self-assured, this trait is apparent in the negotiation, and the claimant may accept a settlement with little or no negotiation. If the claim representative is arrogant, the claimant may become defensive. Arrogance does not help establish rapport with the claimant and does not demonstrate good faith, which requires that the claim representative empathize with and respond patiently to the claimant throughout the negotiation process.

Conversely, if a claim representative's personality is insecure or submissive, the claimant may use those personality traits to influence the claim representative to accept a settlement that is unsatisfactory to the insurer. Thorough knowledge of the facts of the claim can help the claim representative be more confident and less submissive in the negotiation.

Armed with knowledge of the negotiating variables of both parties, claim representatives can apply a variety of claim negotiation techniques to effect successful claim resolutions.

CLAIM NEGOTIATION TECHNIQUES

Most negotiators repeatedly use the same techniques, particularly strategies and behaviors that have produced successful outcomes. However, by using a wider variety of negotiation techniques, negotiators can increase their chances of success. Claim representatives who are skilled in a wide variety of negotiation techniques can choose from them and adapt the ones they choose to the variables of the specific negotiation.

Some negotiation techniques tend to be more appropriate for unrepresented parties; others are more appropriate for represented parties. Some negotiation techniques work well with either type of party. Regardless of the techniques used, honesty is crucial in negotiation. Honesty does not require claim representatives to divulge the high and low figures of their settlement ranges, but they must be careful not to misrepresent facts. This section describes negotiating techniques that are appropriate for all parties, for unrepresented claimants, and for represented claimants.

Negotiation Techniques for Use by All Parties

Two negotiating techniques that can readily be used by all parties to a negotiation are the principle of yes and choicing. Because of their versatility, claim representatives may use either or both of these techniques to successfully negotiate claim settlements. They may also combine these techniques with techniques discussed subsequently to negotiate with specific parties.

Principle of Yes

The principle of yes is a negotiation technique that is often used in sales. This principle is based on the premise that if an individual answers "yes" to a question, he or she is likely to continue to answer "yes" to subsequent questions. To apply the principle of yes, claim representatives should begin negotiations with questions that will generate "yes" answers. Points on which the parties disagree should be avoided until all points of agreement are established. When parties begin a negotiation with items of disagreement, conflict is almost inevitable and may lead to failed negotiation.

In nearly all negotiations, the parties agree on certain facts—often basic facts such as the date of accident, the people involved, and the fact that injury or damage has occurred. When claim representatives focus on these areas of agreement, they apply the principle of yes, as described in the box.

Use of the Principle of Yes

- Adjuster: Good morning, Ms. Acton, this is Joe Schroder, a claim representative with XYZ Insurance Company. I was hoping that we could discuss settlement of your client's claim. Let's see; this accident happened approximately four months ago and it is my understanding that our insured struck the rear of your client's auto. Is that correct?
- Claimant's attorney: Yes.
- Adjuster: It is also my understanding that the damage to your client's auto was paid for by your client's collision insurance coverage. Is that correct?
- Attorney: Yes.
- Adjuster: I see that you have sent us three different medical bills, one from the emergency room where your client was taken following the accident, one from an orthopedist, and the third from a physical therapist. Are those all of the medical bills?
- Attorney: Yes.
- Adjuster: And finally, I see that you have sent us lost wage information and documentation that your client was disabled for one week. Is that correct?
- Attorney: Yes.
- Adjuster: So, the only thing left is for us to agree on a settlement value.

By using the principle of yes to focus on the areas of agreement, the claim representative can increase the motivation of all parties to the negotiation to work toward resolution as they begin to see how much they agree on.

Choicing

Choicing is a negotiation technique based on the principle that if someone is presented with a choice of possible solutions, one of those choices is presumably the correct choice. Choicing is based on the assumption that people feel empowered when given a choice. To use choicing, the claim representative first presents the choice the other party will find least desirable. This choice becomes a basis of comparison, making the next choice more appealing.

A claim representative who has developed rapport with the other party will usually be able to predict the other party's choice of solutions.

For example, the transmission on the insured's car has been severely damaged and needs to be replaced. The insured's Personal Auto Policy bases coverage

for the loss on actual cash value. The insured vehicle has a life expectancy of approximately 120,000 miles; currently the odometer shows almost 60,000 miles. The claim representative's impression from previous conversations is that the insured can afford to pay little more than the \$500 deductible toward the repair. The claim representative may use choicing with the claimant as described in the box.

Use of Choicing

Claim Representative: Mr. Nelson, I just received the appraisal on your car. The transmission is not repairable and needs to be replaced. We have a couple of options for repairing the car and the choice is yours.

Choice One We could pay to put a new transmission in your car. This would cost approximately \$4,000, but because your policy provides actual cash value coverage, we will have to depreciate the cost of the transmission. To explain, your car has an anticipated useful life of 120,000 miles and it already has 60,000 miles on it; so your transmission is approximately 50 percent worn. Therefore, we will pay only 50 percent of the replacement cost, or \$2,000 minus the \$500 deductible—\$1,500 toward the transmission replacement.

Choice Two As another option, I was able to locate a transmission at one of our salvage yards that has only 58,000 miles on it. This transmission is not an original manufacturer's part, but instead it is an LKQ (like kind and quality) transmission. If you agree to this option, you will have to pay only your deductible, \$500. We will not subtract depreciation from your claim because this transmission is already depreciated. Which option do you prefer?

The choices that can be presented are often limited only by the claim representative's imagination and resourcefulness.

Negotiation Techniques for Use With Unrepresented Claimants

Making a claim can be a stressful, anxiety-producing experience. Many people have little, if any, knowledge of insurance coverage. Unrepresented claimants may trust neither the claim representative nor the insurer. Many claimants have limited or no knowledge of settlement values, such as the value of a bodily injury claim. Media attention spotlighting excessively high verdicts and settlements tends to inflate the claimant's expectations for a loss settlement. A claimant's unrealistic expectations of the claim's value can make negotiating a settlement challenging for the claim representative.

Additionally, attorneys and public adjusters know and understand certain common practices observed in the negotiation process that unrepresented

claimants would not observe. For example, they realize the insurer usually will not make a settlement offer until the attorney or public adjuster has provided the appropriate proofs and documentation. A claim representative and an attorney or a public adjuster may have a heated negotiation discussion and neither party will take it personally. Each sees this as part of the negotiation process. Conversely, unrepresented claimants with little or no knowledge of the claim process may assume that the claim representative, rather than themselves, is responsible for proving the claim. Claimants may be offended by heated discussions and may take them personally; emotions can flare and rapport can disintegrate.

Certain techniques, such as the following, can help smooth negotiations with unrepresented claimants:

- Collecting and using extraneous information
- Using sales techniques in negotiation
- Using needs analysis to effect a settlement
- Making the first offer

Collecting and Using Extraneous Information

Claim representatives collect and use extraneous information about the claim, the claimant, and the claimant's wants and needs that will help them develop creative settlements that meet those wants and needs. Claim representatives look for clues in information that claimants provide about themselves. For example, when telephoning the claimant, the claim representative may notice the sounds of children and pets in the background, providing information about the claimant's family situation. The claim representative may use this information to develop a settlement that meets family needs, such as prepayment for childcare and pet supplies. Conversations with the claimant can provide information about the claimant's level of education and understanding of the claim process. The claim representative may be able to propose a settlement for this claimant that pays for childcare or eldercare while the claimant pursues advanced education.

If a meeting can be arranged at the claimant's home, the claim representative can make observations about the claimant's lifestyle, hobbies, and other interests. Claimants and insureds may even disclose arbitrary or genuine deadlines for resolution of the claim. For example, if an insured says, "I need my car repaired soon because I leave for vacation in two weeks," the claim representative may propose replacing the damaged vehicle with a used vehicle, leading to a speedier resolution than requiring the insured to wait for repairs to be completed.

Claim representatives can sometimes use extraneous information to develop noncash settlements that meet the claimant's needs more adequately than cash settlements. For example, a claimant who has filed a products liability claim against a cereal maker because his daughter found a piece of plastic in her cereal may be satisfied with a year's supply of cereal instead of a cash

settlement. Items used in such settlements must be tangible and must have some monetary value. For example, in a personal property claim for losses that include a broken article of fine china in a pattern that is no longer available, the claim representative may observe that the china has sentimental value for the insured. Rather than offering to replace the entire set of china with a new set of the same brand in a different pattern (and collecting the remaining pieces of the old set), the claim representative may use special replacement services available to insurers to obtain a replacement piece. The claimant, then, can keep the set of cherished china.

Using Sales Techniques in Negotiation

Real estate agents sell houses and automobile dealers sell cars; in a similar fashion, claim representatives “sell” settlements. The theories and philosophies used in sales apply in all sales situations, whether it is the sale of an automobile or the settlement of a claim. A knowledge of sales techniques can help claim representatives sell settlements.

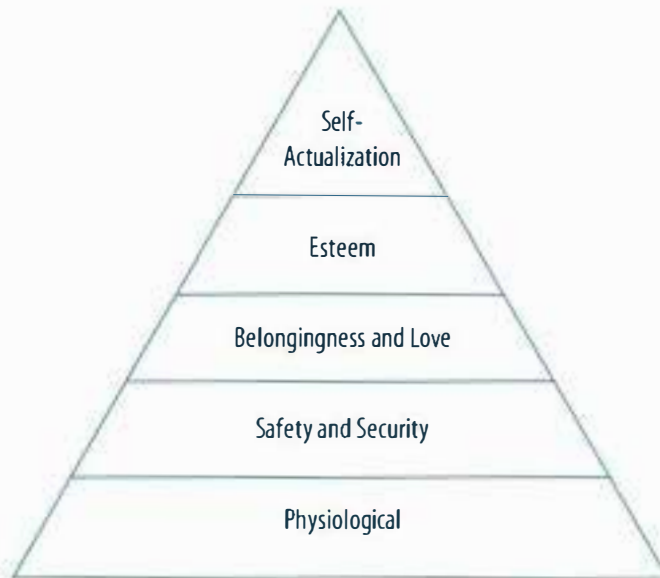
All sales training courses begin with the same premise: to make a sale one must first understand the needs and wants of the customer. The claim representative uses the understanding of the claimant’s wants and needs as the basis of the negotiation. Lacking that understanding, claim representatives may develop what they believe is an equitable settlement and then attempt to force it on the claimant.

Another sales technique is to mirror the behavior of the customer. For example, a clothing salesperson may suggest garments that are of similar style to the garments the customer has selected and make casual conversation on the topics that the customer introduces. People tend to like other people who are similar to themselves. A claim representative who mirrors the behavior of the claimant may develop greater rapport, leading to a better relationship and, ultimately, the sale of the claim settlement.

Using Needs Analysis to Effect a Settlement

A researcher of human behavior, Abraham Maslow established a hierarchy of human needs, often represented as a pyramid. The bottom of the pyramid represents basic needs and the top represents self-actualization needs.

Maslow theorized that people have different levels of needs, starting at the level of basic physiological needs (such as food, water, shelter, and clothing), and progressing to the need for safety and security, the need for belongingness and love (social acceptance), the need for esteem (mastery, competence, and status), and the need for self-actualization (autonomy, responsibility, and challenge). According to Maslow, individuals fulfill their needs in ascending order; they start with the most basic needs, and then move to the next need level when those needs are satisfied. Exhibit 7-3 depicts Maslow’s Hierarchy of Needs.

EXHIBIT 7-3**Maslow's Hierarchy of Needs**

Reprinted with permission from A.H. Maslow, *Motivation and Personality*, 3rd ed. New York: Harper & Row, 1987.

All people operate at various levels of the hierarchy depending on the situation an individual is facing at the time. A person who has an annual income of \$150,000 may be at the esteem level of the needs hierarchy, but if a fire destroys the person's home, he or she may revert to the physiological level or the safety and security level.

Claim representatives should be aware of the possibility that a claimant may be operating at a level at which money may not be the most important need. It may be easier to negotiate a claim involving a total loss house fire that has returned a family to the physiological level or safety and security level than to negotiate a minor burglary with an insured who is at the esteem level and is more concerned with not being taken advantage of by the claim representative than with replacing the stolen items. In the house fire claim, having lost most of its material possessions, the family is operating on a lower needs level and is motivated to conclude the claim. But in the minor burglary case, the claimant is motivated at a higher needs level and may hope to get as much money as possible to prove that he can do better than the insurer. In both cases the claimants' needs levels affect their motivation to negotiate the claims.

Making the First Offer

Generally, the party in a negotiation who makes the first offer holds a weaker initial bargaining position. The party who responds with a counteroffer holds a stronger bargaining position. If the original offer is significantly lower than expected, the party may increase the counteroffer. Consequently, negotiators try to avoid making the first offer. The circumstances of a specific case, however, may prompt one side or the other to make the first offer.

In negotiations with an unrepresented claimant, it may be best for the claim representative to make the initial offer. Most unrepresented claimants do not know the value of the claim and may suggest an inflated settlement amount on the assumption that it will be negotiated down. The claim representative is then put in the difficult position of responding to this posturing while seeking to retain the rapport established with the claimant.

To make the first offer, the claim representative can open with a statement such as the following: "I have taken the time to examine all the information you have shared and used it to develop an evaluation of your claim." Such a statement captures the claimant's interest. The claim representative can then explain the evaluation and how it was developed from the information provided. Allowing the claimant an opportunity to react, the claim representative should listen for information or he or she may not have considered in reaching the evaluation. Claim representatives should not concede merely because the claimant wants more money; any concessions made should be based on factual information related to the claim.

Because whether the claimant is represented or not represented affects how the claim is negotiated, claim representatives may use techniques that are different from those just discussed when negotiating with claimants' representatives, such as attorneys or public adjusters.

Negotiation Techniques for Use With Claimants' Representatives

Attorneys or public adjusters who represent claimants usually understand the claim process and claim settlement procedures. Public adjusters usually negotiate property claims; attorneys can negotiate any type of claim. The negotiation technique a claim representative uses in a particular case depends on the type of claim involved. For example, because liability claims for general damages (such as pain and suffering) have more subjective values than property claims (such as building damage), they require a different negotiation technique.

The following techniques are useful to claim representatives when negotiating with a claimant's representative:

- Using information obtained from the claim evaluation
- Establishing strengths and weaknesses

- Using timing in negotiation
- Making the first offer
- Making concessions

Using Information Obtained From the Evaluation

A claim representative's thorough knowledge of the claim is usually a strength in negotiation. Having investigated the loss, the claim representative usually has more detailed knowledge of the claim than the claimant's attorney, public adjuster, or other type of representative.

When the claimant's representative makes a demand in the negotiation, the claim representative should avoid an immediate reaction. Labeling a demand as too high or too low actually favors the other party. Instead, the claim representative should ask the claimant's representative to explain how the settlement value was determined and should listen carefully to the answer. The answer reflects the extent of the claimant's representative's knowledge of the claim and the level of thought that was put into the evaluation.

Claim representatives can use their thorough knowledge of a claim to develop initial offers or counteroffers and to explain the rationale based on the facts of the case. Just as with unrepresented claimants, the claim representative should insist that any changes in the settlement offer be justified based on the facts of the case.

Establishing Strengths and Weaknesses

The strengths and weaknesses of negotiation variables are often called negotiation "chips." Some chips may be more significant than others based on the claimant's wants and needs. The following example demonstrates the value of negotiation chips in a negotiation with a public adjuster and describes how the claim representative could play these chips.

An insured's three-bedroom ranch-style home is partially damaged by fire and sustains water damage caused by the fire department. One bedroom must be rebuilt, and a significant amount of damaged personal property must be replaced. The rest of the house has sustained severe smoke damage and requires extensive cleaning and replacement of wall coverings and carpets.

The day after the fire, the insured retains a public adjuster to handle the loss. The insured is currently staying in a hotel and wants to move back into his house as soon as possible. However, it appears that the house will be uninhabitable for at least three months. Coverage under the insured's homeowners policy is adequate to pay for the damage to the structure and the personal property and to pay the additional living expense. The claim representative has completed an estimate of the structural damage that totals \$52,000. The public adjuster has submitted an estimate of \$73,000 for structural damage and an inventory of damaged personal property totaling \$24,000. Upon reviewing the public adjuster's estimates, the claim representative notes

that construction prices and the prices of personal property in the inventory appear inflated.

The negotiation chips that favor the insurer include the following, in order of least to most significant and powerful for negotiating a satisfactory settlement for the insurer:

- The more difficult the public adjuster is to negotiate with, the longer the insured will be out of the house.
- The insured lacks proof of ownership (such as receipts, photos, or owner's manuals) of high value pieces of personal property (including cameras, a laptop computer, and stereo and recording equipment).
- The insurance policy contains a clause requiring appraisal if the loss value cannot be agreed on.

The claim representative should use the least significant chip first in seeking a concession because it is most likely the easiest concession to obtain. In this case, the claim representative would remind the public adjuster that the longer the insured is out of his house, the less satisfied the insured will be. This consideration may encourage the public adjuster to concede on some of the claimed loss.

Chips may also be replayed and combined. For example, in playing the second chip, the claim representative points out that the lack of proof of ownership for the damaged personal property could devalue the claim, and again reminds the adjuster that the insured will be without a house until the claim is settled.

Saving the most powerful chip for last preserves the value of the other negotiating chips. In this claim, if the public adjuster refuses to lower the counteroffer after the first two chips are played, the claim representative may suggest appraisal as an option to determine the value of the claim. Ideally, the possibility of appraisal will motivate the public adjuster to make some concession, such as decreasing the demand. The adjuster knows that appraisal may result in a lesser settlement, and a lesser settlement means a lower commission for the adjuster.

Using Timing in Negotiations

For many claims, the best time to settle with a claimant's attorney is just before the claim becomes a lawsuit. At that point, the attorney has usually spent only a couple of hours working on the claim. Although attorney fee agreements can differ, many claimant attorneys receive one-third of a settlement as their fee. Once the claim becomes a lawsuit, the plaintiff's attorney must invest much more time in the claim. Even though a higher settlement—and a greater fee—may result from a litigated case, the attorney's fee per hour of work decreases for each hour devoted to the case. The following example illustrates this result:

The claimant sustained a back injury as a result of an automobile accident that occurred when a vehicle driven by the insured struck the rear of the vehicle driven by the claimant. The claimant was taken to the hospital by ambulance and lost two weeks' salary because he missed work. In addition, the claimant saw an orthopedist several times over the course of a two-month period and required physical therapy three times per week. The bodily injury claim is valued at \$4,500, and the claimant's attorney will receive a one-third contingency commission. If the attorney spent two hours interviewing the client, requesting and handling lost wage and treatment reports, and negotiating with the claim representative, the attorney's fee of \$1,500 breaks down to \$750 per hour. But if the claim becomes a lawsuit, the attorney must conduct pre-trial discovery, requiring significantly more time. The following table indicates some of the attorney's activities in preparing for trial with approximate times needed to complete them:

Attorney Activity	Time Required
File summons and complaint to institute litigation	1 hour
Send out and complete interrogatories	3 hours
Take depositions of defendant and plaintiff	6 hours
Attend mandatory settlement conference	3 hours

If the claim is settled for \$6,000 during the pre-trial settlement conference, then the plaintiff attorney has invested 15 hours in the claim. The attorney will receive \$2,000 (one-third of the settlement); however, the hourly breakdown for the work is \$133.33 per hour. Compared to the original fee of \$750 per hour, the prospect of an 82 percent drop in "hourly commission" may give the attorney an incentive to settle the claim before a lawsuit requires more time investment.

Making the First Offer

Which party should make the first offer depends on many variables, including personalities, comfort level with one another, insurer policies, and previous experience.

As discussed, the party making the initial offer of settlement takes a weaker negotiating position. The demand of a claimant's representative made before any offer may be higher than the mid-range initial offer the claim representative might propose. To entice a reasonable demand, the claim representative may begin the negotiation by asking the claimant's representative what fair settlement value would settle the case that day. For example, if the claim representative's pre-negotiation settlement range was from \$4,000 to \$6,500 and the claimant's representative demanded \$6,500 to settle the claim that day, then the claim representative can make a more enticing initial settlement offer than if the claim representative had made an initial offer of \$5,250 (mid-range).

Making Concessions

In a negotiation, the claim representative should make concessions only for one of the following three reasons:

- New information that affects the claim value has become available.
- The other party has made a concession.
- A concession by the claim representative would allow the claim to be settled that day.

Even after bargaining has begun, if the facts of the claim change because the claimant has introduced new information or because the claimant's condition has changed (usually for the worse), the claim representative should reevaluate the claim and, if appropriate, make a concession.

If the claimant lowers the counteroffer, the claim representative could choose to concede by increasing the insurer's offer in order to effect a settlement. That concession offer does not necessarily have to equal the other party's reduced counteroffer. For example, the claim representative may initially offer \$6,000, and the other party counteroffers \$10,000 to settle the claim and then drops to \$8,000 (a \$2,000 concession). The claim representative may concede with an offer of \$7,000 (a \$1,000 concession).

When there is a compelling reason to settle the claim immediately (such as before the claimant leaves for an extended vacation), the claim representative may make concessions to accomplish that settlement. If the other party demands a specific settlement amount that is within the pre-negotiation settlement range, then the claim representative may concede, accepting the demand to avoid prolonging the negotiation unnecessarily.

Negotiation Techniques Used by Claimants' Representatives

Claim representatives should be familiar with negotiation techniques commonly used by claimants' attorneys, public adjusters, and other claimants' representatives. Although some techniques are effective when used by attorneys and public adjusters, their use by claim representatives may be detrimental to negotiations.

Limited Authority Negotiations

In some negotiations, one or more parties may have authority to negotiate only up to a limited amount. To accept an amount above the limit, the party must consult some other authority. Car dealers are known for using the limited authority technique as a ploy. For example, a potential customer is in a showroom looking at a car that has a sticker price of \$20,000. The salesperson opens the conversation with the customer and eventually asks what the customer would be willing to pay to take the car home that day. If the customer responds with an offer of \$17,000, the car dealer says, "I need to talk to my manager. Please have a seat and I will be right back."

The salesperson's authority is limited, so the customer is really negotiating with the salesperson's manager, someone who is remote to the customer. The car dealership uses this technique to its advantage by making the customer wait for a response. While waiting, the customer is already considering how much more to offer if the \$17,000 offer is not acceptable.

Attorneys, public adjusters, and other claimants' representatives may also use this technique. A claimant's representative can settle a claim legally and ethically only after speaking to the client, and in most cases the client is not present during the negotiation. The need to contact the claimant gives the claimant's representative the opportunity to leave the claim representative waiting. Upon returning, the claimant's representative may suggest that the claimant is willing to settle for \$1,000 more than the current offer, for example. In most cases, the claimant's representative uses this technique in an effort to induce the claim representative into offering more money.

Generally, claim representatives should not use the limited authority technique. They should begin a negotiation with the authority needed to complete the negotiation. The perception that the claim representative does not have authority to settle the claim can undermine his or her negotiating position. For example, after learning about the limited authority, the claimant's representative could ask to speak with the claim representative's supervisor, implying that the claim representative has lost control of the negotiation. If the value of the claim increases as a result of newly discovered information, the claim representative with limited authority must consult a supervisor or manager to gain more authority to complete the negotiation.

Timing in Negotiations

As previously discussed, claim representatives can use timing to their advantage in negotiations because claimants' attorneys may prefer to settle claims before they go into litigation to avoid decreasing their hourly commission. Insurers also benefit from settling claims before litigation begins by avoiding additional court and legal costs. A claimant's attorney may use that fact to encourage a claim representative to accept a higher demand.

Having a thorough knowledge of the various negotiation techniques available, claim representatives should also be aware of which techniques to avoid. Some techniques provide no negotiation advantage to the claim representative; other techniques are inappropriate because claim representatives must demonstrate good faith when interacting with claimants and their representatives.

NEGOTIATION TECHNIQUES TO AVOID

Some techniques that work well in general negotiations do not work well in negotiations to settle claims and, in fact, may contribute to the failure of the negotiation. Claim representatives should be familiar with and avoid these techniques. In addition to limited authority negotiation, these techniques include using a first and final offer (Boulwarism) and using decreasing or limited offers.

Using a First and Final Offer—Boulwarism

Boulwarism, or making a first and final offer, is named after Lemuel Boulware, a former chief executive officer of General Electric Company. When negotiating union contracts with General Electric's labor unions, Boulware would make a single offer, telling the unions that it was the final offer and if they chose not to accept, then they should strike.

This technique is inappropriate for claim representatives. Presented with the first and final offer, the claimant may refuse it, ending the negotiation and possibly resulting in a more costly resolution for the insurer. Boulwarism invites conflict and prevents collaboration. In contrast, other negotiation techniques provide an opportunity for parties to collaborate to achieve a resolution.

Using Decreasing or Limited Offers

Another negotiation technique that claim representatives should avoid is making decreasing or limited offers. A decreasing or limited offer is an offer that changes simply because time passes. For example, a party to a negotiation may offer \$4,000 one day, to decrease by \$200 for each day acceptance is delayed. Similarly, a limited offer is withdrawn after the passage of a specified time. For example, the offering party may specify that if the offer is not accepted within forty-eight hours, it will be withdrawn.

Claim representatives should not use decreasing and limited offers. They invite conflict by placing unreasonable constraints on the other party. Once a claim representative makes an offer in a negotiation, it should stand unless a change is warranted by a change in the facts of the claim.

In addition to these detrimental negotiation techniques, a claim representative can encounter other pitfalls during the negotiation process.

COMMON PITFALLS IN CLAIM NEGOTIATIONS

Things can go wrong at any point in the negotiation process. Claim representatives, as well as other negotiating parties, can avoid some of these problems and can conduct more successful negotiations by being aware of some common negotiation pitfalls.

Allowing Personalities to Influence the Settlement

Claim representatives must sometimes negotiate with parties who are difficult to interact with. Personalities can interfere and the negotiation process can turn into a clash of egos. As emotions rise, rational thought diminishes, and negotiations come to a halt. For this reason, all parties to a claim negotiation should avoid allowing personalities to influence the settlement.

Claim representatives must maintain their focus on resolving the claim and avoid being swayed by the other party's personality. They should object to

any form of abuse, but good-faith claim handling precludes retaliation to personal attacks. In response to a personal attack in the negotiation, the claim representative should inform the other party that, if the offensive behavior continues, the negotiation will cease until the party is prepared to negotiate in a civil manner. Offensive behavior should never affect the amount of the offer, the claim representative's willingness to negotiate, or any other factor that could prevent a fair claim settlement.

Trading Dollars

Trading dollars occurs when negotiators barter on the amount in dispute, not considering the facts of the claim. Claim negotiations should focus on the facts of the claim, and not on the offers and demands. If the facts of the claim change, the parties should increase or decrease their offers or demands according to the facts, but the settlement amount should be a byproduct of the negotiation.

Bidding Against Oneself

Parties to negotiation sometimes inadvertently bid against their own offer; that is, they increase their offer for no reason. For example, a claim representative could say, "We believe that this claim is worth \$5,000, but if we settle the claim today, we would increase our offer to \$5,500." In this statement, the claim representative has bid against the insurer's offer without any concession from the other party. Such an offer could signal that the claim representative lacks confidence in the claim evaluation or is overly eager to settle the claim. Generally, concessions in a negotiation should be offered only in response to a concession made by the other party and in a good-faith attempt to settle the claim for the appropriate amount.

Conceding as Deadlines Approach

As deadlines approach in negotiations, the number of concessions usually increases. For example, many union contracts are settled at 11:59 PM on the day of a deadline and, as described previously, many claims settle on the courthouse steps before a trial.

A party can gain significant power in a negotiation by determining any deadlines that may affect the other party. One such deadline for a claim representative to be aware of is the statute of limitations on a claim, which sets the time within which a claimant must file a lawsuit. Other deadlines can be determined through conversation and listening to the other party for such information. Some deadlines, such as impending holidays, may be "soft" deadlines; others, such as a tax deadline for a claimant who needs money to pay the taxes, may be "hard" deadlines.

Claim representatives also have hard deadlines with which they or the insurer must comply and which may increase their motivation to offer concessions.

For example, if the insurer gives its claim staff a directive to reduce pending claims by the end of the month, the claim representative may need to settle the claim and report the file closure by that deadline. As the deadline approaches, the claim representative may offer the highest amount in the settlement range in an effort to close the claim by the end of the month. Claim representatives should not make such settlement offers. Instead, their knowledge that a deadline might be imposed should induce them to work more quickly to settle claims sooner and avoid accepting excessive settlements to meet the deadline.

SUMMARY

A negotiation is any discussion designed to produce an agreement among opposing parties. Claim representatives negotiate many claim settlements.

Negotiators can adopt one of four different negotiation styles: win-win, win-lose, lose-win, and lose-lose. The choice of style for a given negotiation is determined by the negotiators' concern for obtaining the best outcome and achieving rapport. Whereas the win-win style usually renders more satisfactory, creative claim settlements, claim representatives may sometimes choose to use the win-lose and the lose-win negotiation styles for claim negotiations as the situation warrants. Except in rare circumstances, claim representatives should avoid using the lose-lose style of negotiation.

The negotiation process involves four steps: prepare, develop and evaluate alternative outcomes, identify each party's interests, and make concessions and create appropriate resolutions. The evaluation step should include establishing minimum and maximum settlement amounts acceptable for a claim resolution and developing a BATNA for comparison with other settlement options. Identifying each party's interests is crucial to making concessions and developing appropriate resolutions.

The variables that affect claim negotiations can be distinguished between the claimant's negotiation variables and the claim representative's negotiation variables. The claimant's negotiation variables may include the claimant's negotiation phase, how badly the claimant needs money, time pressures, the claimant's emotional reaction to the loss, the claimant's experience with or knowledge of insurance claims, and the claimant's personality. Some of the most significant variables that affect claim representatives are their knowledge of the claim and their authority level, the number of alternatives available, time factors, claim negotiation settings, and the claim representative's personality.

Many negotiation techniques can be used in claim negotiations. Some techniques, such as the principle of yes and choicing, can work well for all parties to a negotiation. When negotiating with unrepresented claimants, claim representatives find other techniques useful, including collecting and using extraneous information, sales techniques, needs analysis, and making the first offer. In negotiations with claimants' representatives, such as attorneys, public

adjusters, or other representatives, other techniques are appropriate, including using information obtained from the claim evaluation, establishing strengths and weaknesses, using timing, making the first offer, and making concessions.

Claim representatives should be aware of techniques that claimants' representatives may use, such as limited authority negotiations and the counter-effect of timing. Claim representatives should avoid some negotiation techniques entirely because they do not produce satisfactory claim settlements for an insurer. Examples of such techniques are using a first and final offer and decreasing or limited offers.

Finally, claim representatives should be aware of common pitfalls in claim negotiations in order to avoid them. These pitfalls include allowing personalities to influence the settlement, trading dollars, bidding against oneself, and conceding as deadlines approach.

Claim representatives should expand their range of negotiation behaviors to be more successful. Knowledge of the negotiation process, variables, techniques, and pitfalls can help them adopt new negotiation behaviors.

When negotiation fails to effect a claim settlement, parties use various alternative dispute resolution techniques. When these techniques fail, litigation ensues. The final chapter examines a claim department's management of litigation.

CHAPTER NOTE

1. Judith Gordon, *Organizational Behavior: A Diagnostic Approach*, Upper Saddle River, N.J.: Pearson Education, Inc., 2002), pp. 336–337.