

# The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases

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Introduction .....	212
A. An Example of the Negotiation Counsel Model....	212
B. The Traditional Model and the Need for Innovation.....	215
I. The Trucking Industry and the Negotiation Counsel Model in Catastrophic Injury Cases.....	217
A. Background on the Trucking Industry .....	217
B. Covenant Transport .....	218
II. Implementing the Negotiation Counsel Model .....	219
A. Gaining the Support of Senior Management .....	219
B. Early Investigation, No-Strings-Attached Assistance, Face-to-Face Meetings, and Information Exchanges .....	220
C. The Negotiation Counsel's Conduct: Relating to Attorneys and Claimants .....	224
1. Professional Relationships .....	224
2. Conduct and Contact .....	225
D. Crafting Solution-Oriented, Creative Agreements.....	228
E. Fostering Acceptance of Agreements .....	230
III. Benefits of the Negotiation Counsel Model.....	233

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A.	Legal and Economic Benefits .....	233
1.	Corporate Defendant .....	233
2.	Claimant .....	237
B.	Non-economic Benefits .....	237
1.	Corporate Defendant .....	237
2.	Claimant .....	238
IV.	Objections to the Adoption of the Negotiation Counsel Model .....	239
A.	Practicality .....	239
B.	Displays of Weakness .....	241
C.	Disclosure .....	242
D.	Inertia .....	242
E.	Personal Risk .....	243
F.	Advantages of Delay .....	243
G.	Genuine Concern .....	244
H.	Self-Interest of Agents .....	244
V.	Similar Approaches .....	245
A.	Settlement Counsel .....	245
B.	The Toro Model .....	246
VI.	Conclusion and Potential for Negotiation Counsel Model in Other Areas of Law .....	247

#### INTRODUCTION

##### A. *An Example of the Negotiation Counsel Model*

Imagine a highway accident between a tractor trailer and a passenger car that results in the death of the only two occupants of the car, both of whom are members of one family, and the driver of the truck. The trucking company conducts an immediate investigation and concludes that its driver's negligence caused the accident.

In-house counsel for the trucking company, acting as "negotiation counsel," contacts the family's funeral director and explains that it is the company's custom in such accidents to send a representative to the funeral to pay respects if the family desires such representation.<sup>1</sup> The family conveys their desire for the representative be present. The company representative attends the services. The company sends flowers with a note from the company president stating that the people of the company are sorry for the family's tragic loss.

Soon thereafter, the trucking company's in-house counsel learns that the family has hired legal counsel. Negotiation counsel calls the

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1. "Negotiation counsel" need not be in-house counsel. A company may hire outside negotiation counsel.

family's attorney and offers to travel to claimant counsel's office to tell the family that the people of the company are sorry for the family's tragic loss, apologize on behalf of the company, and offer "no strings attached" immediate financial assistance for the family. The family's attorney accepts the offer of a visit.

The meeting between the family, their counsel and the negotiation counsel occurs a month after the accident. During the meeting, negotiation counsel expresses genuine sympathy for the family, apologizes for the accident, provides for a grief counselor of the family's choosing, and funds the family's monthly mortgage, utility bills and other necessities. He also provides for the purchase of a vehicle for the family. The financial assistance is provided "without strings" in order to avoid the addition of financial distress to the family's tragedy.

Negotiation counsel also asks the family if they want to convey anything to the company or simply describe how their lives have changed as a result of the accident, and thereafter, he simply listens as the family speaks at length. He hands counsel for the family a three-ring binder filled with over one hundred pages of information including: the driver's personal file, maintenance records on the tractor and trailer involved in the accident, information detailing the location of the truck in the days preceding and the day of the accident, and other information.

Negotiation counsel explains that the company wishes to take financial responsibility for the accident agreeing to a reasonable financial settlement without unnecessary denials and delays. Counsel for the family indicates that she has handled a number of serious trucking accidents where the approach taken by the company was very different and that the new attitude is refreshing. Negotiation counsel suggests that he is always available to communicate by phone and email and that the company would welcome an early mediation date.

Soon after the meeting, counsel for the family calls negotiation counsel and advises that she has taken a statement from a local resident, who though he did not witness the accident, will testify that he saw a tractor trailer driving approximately 60 miles per hour (MPH) in a 35 MPH speed limit only three blocks from the site of the accident less than a minute before the accident occurred. Claimant's counsel says that the statement is of great importance in light of a recent verdict for \$5,000,000 involving an accident caused by a truck traveling far in excess of the speed limit.

As a result of the company's continuing investigation, the company locates a person who did witness the accident, though she was

not listed on the police accident report. When trial counsel for the company interviews that witness, he learns that the witness saw the speeding truck described by the claimant counsel's witness, but that it was not the truck involved in the accident. Further, the witness claims that the truck involved in the accident was not speeding at the time of the collision. Negotiation counsel immediately provides claimant's counsel with a copy of the witness statement.

Following the company's research, negotiation counsel advises claimant's counsel that investigation has indicated that one of the family members killed in the accident was suffering from a terminal illness and had only months to live. Since the question affects the calculation of lost earnings, a major element of the settlement valuation, he requests that claimant's counsel provide the company with a medical records release so that the issue can be disposed of one way or the other. Normally such releases are not given to potential defendants, but it is provided in this case as a result of the help provided to the family by the trucking company. A review of the medical records reveals that the decedent was not terminally ill. The company adjusts its investigations accordingly. Soon thereafter, mediation is scheduled.

The company is represented at mediation by its normal trial counsel for that state and by negotiation counsel. Throughout the day, the parties engage in a series of offers and counter offers. Near the end of the day, the parties reach an impasse and it appears that mediation will end without agreement.

Prior to mediation, negotiation counsel had spent a lot of time listening to the family and their counsel talk about what was important to the family, their hopes and plans for the future, and about their family members who died. With this information, he designs a potential settlement offer package that satisfies the interests of the family by supplying a lump sum payment, a sophisticated combination of tax advantaged annuities that provide for educational and retirement needs, as well as a memorial scholarship fund at a school of particular importance to the family. The total cost of the package to the company is \$2,000,000.

Negotiation counsel meets privately with counsel for the claimant's and explains the package in detail. He states that though the package is not an official offer of settlement, he will strongly recommend it to the company if the claimant's counsel will encourage her clients to seriously consider the package. Both counsel agree to such an approach and soon thereafter, the parties agree to convert the package into a formal offer and acceptance. The matter is settled five

months after the accident.<sup>2</sup> Prior to the adoption of the negotiation counsel model by the company, the average duration of such claims was 27 months.

### B. *The Traditional Model and the Need for Innovation*

In an environment of antagonism, secrecy, and suspicion, a standoff like the above hypothetical could easily have escalated into a costly and time-consuming legal suit. Opposing parties, maneuvering for a stronger bargaining position and fueled by distrust of the other's motives, often feel pressured to hoard information that would otherwise help bring about a reasonable early resolution. In the given hypothetical, how much did the early conduct, candor, goodwill, and credibility of the negotiation counsel impact mutually beneficial outcome? How much did his early investigations affect the value of the case? How much were his genuine expressions of sympathy worth to the decedent's family? While such an expedient and reasonable outcome is often beyond the reach of corporate trial attorneys following standard practice in catastrophic cases, achieving it is possible under a new approach.

This article proposes a model for dispute resolution that hinges on the creation of a different type of attorney: a "negotiation counsel", who facilitates early settlements through an empathetic, problem-solving approach that employs a heavily front-loaded investigation, face-to-face expressions of genuine sorrow for tragic losses, and in appropriate cases, apologies and payment of "no strings attached" funds for the immediate needs of the claimant families. The mediations described should be characterized by informal exchanges of information

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2. Just prior to mediation, defense counsel advised the company that a reasonable settlement value was two to three million dollars with an average settlement value of \$2,500,000. He estimated additional attorney fees, expert fees and costs of \$75,000 if the claim did not settle at the early mediation and followed the normal course used by his other trucking company clients. That course would include the filing of suit by claimant's counsel, followed by formal discovery and mediation approximately a year and a half to two years after the accident. Thus, using the traditional model, the company would have paid \$2,575,000 to settle the claim. The actual settlement of \$2,000,000 resulted in a savings of \$575,000 to the company. Pursuant to the graduated fee agreement between the claimant's counsel and the family, the contingency fee is 30%. Had the claim not been settled so quickly suit would likely have been filed and the contingency fee of claimant's counsel would have been 45%. Had the claim settled for \$2,500,000 using the traditional model, the family would have received \$1,325,000 (\$2,500,000 less a 45% contingency fee and \$50,000 in expenses). Using the negotiation counsel approach, the family received \$1,400,000 (\$2,000,000 less 30% contingency fee). Therefore, the family receives \$75,000 more than they would have received had the claim be settled in the traditional way.

and innovative methods and structure of the mediation itself. This new model arises from an analysis of several disputes and settlements negotiated by Covenant Transport, one of the top ten truckload carriers in the United States.<sup>3</sup> While not unique to the company, the model is only employed by a minority of trucking companies. In the industry, Schneider National Carriers and J.B. Hunt Transport Services, the second and third largest truckload carriers in the United States, integrate somewhat similar approaches into their standard operating procedure. However, further application of the negotiation counsel model in the trucking industry and beyond has the potential to translate into immense savings for both claimants and defendants in future catastrophic injury claims.

The Negotiation Counsel Model marks a distinct departure from standard practice in catastrophic accident claims. Suits involving corporate defendants transform into particularly prolonged and adversarial ordeals, given the massive damage a tractor-trailer can inflict and the capacity of companies to pay large damages. When an accident results in serious injuries or fatalities, both the claimant's counsel and the defendant company usually respond by launching parallel investigations. During this period, little to no formal communication occurs between the two parties. Six months to a year often pass before a suit is eventually filed. If filed, the discovery phase follows, amid a tangle of additional pleadings and pretrial motions. At this point, some attorneys initiate mediation, while others proceed directly to trial.

Often, a catastrophic case drags on for years until a settlement or verdict is finally reached. Throughout these transactions, relations between the parties tend to be riddled with acrimony, distrust, gamesmanship, posturing, and protracted tactical maneuvering. Costs, including legal fees, expert fees, travel and other expenses, spiral out of control for both sides. Claimants seek damages for wrongful death and injury, while claimants' counsel associate larger settlements with larger contingency fees. Defendant companies want to avoid or minimize financial penalties, while defendants' counsel, seeking to represent their clients zealously to the end, amass large fees as the case drags on. For claimants, these costs are in addition to payments for medical and emergency services, property damage, and other living expenses, which often cannot wait until the close of legal proceedings. Meanwhile, defendant companies suffer from lost

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3. Covenant Transport, Inc., Quarterly Report (Form 10-Q), at 13 (May 10, 2007), available at <http://www.sec.gov/Archives/edgar/data/928658/000100888607000076/form10q.htm>.

productivity, the consumption of their corporate counsel's and employees' time and energy, as well as from disruptions in key business operations due to extensive discovery.

These factors only intensify and prolong the pain endured by injured individuals and families seeking compensation. For the suffering and grieving, the wait for a settlement postpones the opportunity to find closure and move on with their lives. For the companies involved, these cases create financial uncertainty, for which they are punished by the market. For claimant and trial counsel, failure to expedite resolution precludes them from redirecting valuable time and resources to other matters.

Certainly, the time is ripe for consideration of a new approach to catastrophic accident cases with the goal of reducing costs on all sides while enhancing the benefits. The transition to such a model would require a major paradigm shift, a redefinition of roles, reallocation of resources, and some courageous professional pioneers willing to do the hard work associated with this kind of cultural and professional change. But, as this article will describe, the rewards are promising.

Part II of this article details the basic structure and operation of the trucking industry, one of the largest in the United States. Part III outlines the Negotiation Counsel Model, how it functions, and my actual experiences as in-house counsel at a major trucking firm and acting as outside negotiation counsel for other companies. The article enumerates the benefits of the model in Part IV, then deal with critiques of the negotiation counsel model in Part V. Part VI discusses similar models in use in other industries. The article concludes with recommendations for the future in Part VII.

## I. THE TRUCKING INDUSTRY AND THE NEGOTIATION COUNSEL MODEL IN CATASTROPHIC INJURY CASES

### A. *Background on the Trucking Industry*

The trucking industry is intensely competitive and "highly fragmented."<sup>4</sup> It represents a substantial percentage of the U.S. economy, with nearly \$623 billion in gross freight revenues a year

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4. AM. TRUCKING ASS'N, AMERICAN TRUCKING TRENDS 2005-2006, at 2 (2006). According to the American Trucking Association, there are "564,699 interstate motor carriers on file with the Federal Motor Carrier Safety Administration as of August 2005. 87.0% [of those motor carriers] operate 6 or fewer trucks. 95.8% operate 20 or fewer trucks." *Id.*

accounting for approximately five percent of the nation's GDP.<sup>5</sup> As of 2004, more than 26 million large trucks registered for business purposes were on American roads, traveling more than 388 billion vehicle miles per year and consuming 51.4 billion gallons of fuel.<sup>6</sup> Due to an average of approximately 5,000 fatalities caused per year, the trucking industry is frequently involved in catastrophic injury suits. The costs of these suits constitute approximately three percent of its overall expenditure.<sup>7</sup> In 1997, these costs were estimated to be \$24.4 billion.<sup>8</sup>

### B. *Covenant Transport*

Throughout the article, I will draw from my personal experience as in-house counsel at Covenant Transport, a major American trucking firm,<sup>9</sup> and from my experience acting as outside negotiation counsel for other companies, to illustrate how the Negotiation Counsel Model functions in practice. When I arrived at Covenant in 2003, the company owned and operated approximately 3,500 vehicles, covering 400 million miles a year. Inevitably, accidents occurred, and skyrocketing deductibles made each case harder to afford. In the trucking industry in general, insurance deductibles had been on the rise for years, with the typical amount falling between one and ten million dollars.<sup>10</sup> This represented a vast change from the rates of the late

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5. *Id.* at 1. (noting that revenue for the trucking industry amounted to “\$622.9 billion in gross freight revenues (primary shipments only) from trucking, representing 84.3% of the nation’s freight bill in 2005”).

6. *Id.* (“[There were] 26.2 million trucks registered and used for business purposes (excluding government and farm) in 2004, representing 26.2% of all trucks registered. . . . [There were] 388.0 billion miles logged by all trucks used for business purposes (excluding government and farm) in 2004.”).

7. BEAR, STEARNS & CO., TRUCKING INDUSTRY 23 (2005) (“Although insurance premiums have leveled off over the past year from the dramatic increases experienced in 2002 and 2003, most carriers’ deductibles remain historically high, between \$1 million and \$2 million for most of our carriers (\$10 million at the high end for Swift Transportation).”).

8. FED. MOTOR CARRIER SAFETY ADMIN., U.S. DEP’T OF TRANSP., COST OF LARGE TRUCK- AND BUS-INVOLVED CRASHES 1-2, 4 (2001), available at <http://www.fmcsa.dot.gov/documents/ab01-005.pdf> (“Such costs [in 1999 dollars] include medical expenses, emergency services, property damage, lost productivity, travel delays, and the monetized value of pain, suffering, and quality-of-life lost.”); see also EDUARD ZALOSHINJA ET AL., COSTS OF LARGE TRUCK- AND BUS-INVOLVED CRASHES (2000), available at [http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/CCT\\_FinalReport.pdf](http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/CCT_FinalReport.pdf) (detailed version of study).

9. Covenant Transport was founded in 1985 by David and Jacqueline Parker. Its corporate offices are located in Chattanooga, Tennessee. Covenant Transport – About Us, <http://www.covenanttransport.com/cms/About+Us/2.html> (last visited Nov. 4, 2007).

10. BEAR, STEARNS & CO., *supra* note 7.

nineties, when deductibles commonly ranged from \$50,000 to \$100,000.<sup>11</sup> In response, companies were growing increasingly ‘self-insuring’ over the years,<sup>12</sup> adding further incentive to minimize the costs of catastrophic injury cases.

After witnessing the failure of traditional, adversarial methods to defray costs or produce substantive results, I sought support from senior management to experiment with a new one. The ensuing Negotiation Counsel Model came out of a number of successful negotiations and settlements undertaken since then. The model facilitates mutually beneficial outcomes for both parties more rapidly. It has also saved Covenant Transport millions of dollars in claims and insurance costs.<sup>13</sup>

## II. IMPLEMENTING THE NEGOTIATION COUNSEL MODEL

To establish functional Negotiation Counsel within a corporation, substantial backing from managerial authorities must first be acquired. This empowers the Negotiation Counsel with the necessary freedom to implement approaches specific to the model, including early investigation, no-strings-attached financial assistance, face-to-face meetings, and informal information exchanges. These measures, in conjunction with candid and respectful conduct, help to build rapport and empathy with the claimant, an asset that will later contribute to the crafting of creative, solution-oriented, and sustainable solutions.

### A. *Gaining the Support of Senior Management*

Before this model can be employed in a company context, the advocate of the model must secure the support of senior management. Convincing a company to commit itself to the negotiation counsel approach paves the way for the model’s success. By garnering the support of the management team, the negotiation counsel gains access to

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11. *See id.*

12. Wendy Leavitt, *Controlling Loss: Insuring the Trucking Industry*, DRIVERS, Oct 1, 2002, [http://driversmag.com/ar/fleet\\_controlling\\_loss\\_insuring](http://driversmag.com/ar/fleet_controlling_loss_insuring) (“Jeffery Davis, vice president, safety for Motor Transport Underwriters [comments] . . . ‘Insurance in large companies is just a way of financing losses, except in the case of catastrophic loss . . .’ ‘Right now, the lowest deductible we have is \$100,000 per incident and some companies have a \$1,000,000 deductible. We are encouraging companies to take risk in-house, a practice called ‘self-insured retention.’ When fleet executives do this, they are really betting on themselves.”).

13. Interview with David Parker, CEO, Covenant Transport, in Chattanooga, Tenn. (Sept. 7, 2006) (“Because of this empathetic proactive approach our claims costs have been reduced by millions of dollars.”).

a variety of tools necessary to settle the case efficiently. Perhaps most significantly, she can secure financial and human resources to carry out her work, including tools for early investigation, emergency funds for claimants' immediate needs, and travel to personal meetings. The backing of senior management also empowers the negotiation counsel with the authority to settle the case. This level of clout, combined with a well-informed grasp of the case from front-loaded investigations, is invaluable to bolstering negotiation counsel's credibility while earning the opposing side's respect.

If the accident creates liability in excess of the insurance deductible that the trucking company's insurance carrier must bear, then negotiation counsel must also consult the insurance carrier beforehand. Given the present trend of much higher deductibles, however, this step may not be necessary in all cases.

Whether the company's in-house counsel wishes to act as negotiation counsel herself, or outside negotiation counsel is hired to work alongside a company's trial counsel, the message should be the same. The advocate should be candid about the real costs of change, the extent of the model's benefits, and the nature of the negotiation counsel's role, as defined below. Once the necessary backing has been obtained, a committed team must be assembled to implement the model.<sup>14</sup>

#### B. *Early Investigation, No-Strings-Attached Assistance, Face-to-Face Meetings, and Information Exchanges*

Once management authorizes the new approach, Negotiation Counsel can begin the necessary changes. Normally, after a serious accident, both the claimant and corporate defendant tend to put off direct communication until their parallel investigations are well underway. Often, they will not make contact for many months after an accident. In contrast, a negotiation counsel immediately begins the process of building rapport with the injured individuals and their legal team. She accomplishes this by gently establishing contact with

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14. Because David Parker, the CEO of Covenant Transport, Joey Hogan, its President, R.H. Lovin, its Senior Vice-President, and other senior executives were committed to adapting the company's protocol with respect to claims management, getting senior management support for the negotiation counsel model was not difficult. In certain cases, it is critical to have an insurance carrier committed to this approach. Covenant's excess insurance carrier, Lloyd's of London, led by the Wellington Syndicate, is a principled leader in taking an empathetic problem solving approach to claims management. Other key people at Covenant Transport who work to make the model effective include: Rick Reinoehl, Doug Tagtmeyer, Denise Godfrey, Amanda Gadd, and many others.

the other party early on, perhaps by sending flowers or offering to visit a hospital or rehabilitation center. In cases involving a fatality, she may work through a funeral director, or *through the family's counsel* when one has been hired, to secure the approval of the family before sending a representative to pay respects at the decedent's wake. Pursuant to procedures agreed to by senior management, negotiation counsel may also offer to help with the family's immediate financial needs, including medical bills, funeral costs, or family travel expenses. Throughout this process, her first priority is to demonstrate empathy and respect for those fatally or severely injured in an accident.

The next round of contact comes in the form of early, informal exchanges of information. Ideally, these exchanges take place face-to-face. Prior to formal discovery, negotiation counsel travels to meet with the claimants and, if they are represented, their attorney, to open channels of communication.<sup>15</sup> The negotiation counsel comes to the table with the goal of uncovering the claimants' and opposing counsel's objectives while making her own objectives clear. She opens

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15. My trial counsel often cautions me against traveling to visit the claimants or their counsel. The traditional view is that such action makes me look weak. Apparently, this is the prevailing view because I am told by most of the claimants' counsel whom I visit that my visit is the first time they have ever received a visit by someone in my position. I address this issue of perceived weakness soon after I arrive at claimant counsel's office. I typically say that there are at least two possible reasons for my trip: the first is that I am desperate to settle or simply too weak to face the possibility of hard fought litigation. The second possibility is that I actually believe that both parties can benefit from handling the case in a different and more constructive way than the norm. I tell them that the second reason is the correct one in my case and that I routinely make such visits in order to open the door to early, mutually advantageous discussions. In my experience, it is critical to say this face-to-face instead of on the phone or by email. Such a paradigm-shifting message must be conveyed with genuine conviction and ego-free quiet strength if it is to be believed. If the other attorney looks the negotiation counsel in the eye and sees that they are sincere about what they are saying, then they have passed a major hurdle in negotiating an early and reasonable settlement. Of course, they will need to follow up by proving their good faith with actions. After settlements are finalized, opposing counsel sometimes comments that my candor or compassion was "refreshing" or "disarming." I also believe that consistently expecting honorable conduct from opposing counsel is a self-fulfilling prophecy in the great majority of the claims I handle. This is counter-intuitive for attorneys, yet my experience has been that attorneys who are treated with respect and dignity tend to respond in kind. Nevertheless, I expect some will think this a naïve or risky approach. The traditional view holds that if one puts aside their main defense talking points for even a moment in an attempt to identify some common ground, they may be confronted with a hard bargaining advocate's response instead of a reciprocal attempt to identify mutual interests. Yet, I find that this happens in only about 1 out of 10 cases, and when it does occur, it is only my pride that is hurt, not my case. The approach I propose requires strength, not weakness, and I believe that comes through to most of the counsel I deal with.

by honestly informing the opposing party that the company wants to do the right thing and will take responsibility where it has fault. She states that the company is hoping to work towards a solution that properly compensates the claimants for their loss. At the same time, she states that the company is not willing to be strong-armed into giving up an unreasonable amount. If the other party admits or demonstrates that their objective is to obtain an unwarranted or unreasonably high recovery, she clearly conveys that the company, if forced to do so, will protect its interests through spirited litigation. Frequently, the first meeting goes well and serves as a springboard for a series of informal and voluntary exchanges of information.

Before and during this stage, the front-loading of corporate resources is essential. Instead of waiting for years for the claimant to file his suit, companies must take the initiative, sparing no reasonable expense in investigating, researching, evaluating and reevaluating the case long before suit is filed. Since no one can place a value on injuries until both sides have a solid understanding of the case, front-loading cases enables productive settlement negotiations to take place earlier. In the usual vacuum of information and communication, rumors and suspicions can damage relations between opposing sides – often irreversibly. This model confronts the fact that the longer parties postpone investigations, informational exchanges, and negotiations, the more attitudes on both sides have time to harden. Once grudges have been formed, and perceptions of the “facts” of the case and the other side’s motives become fixed, parties become far less amenable to reaching a reasonable, mutually beneficial agreement. The appropriate mindset requires weighing the real benefits of sharing knowledge, rather than hoarding it, as lawyers traditionally do. Ultimately, the open exchange of information greatly helps to dispel rumors, increase informed trust, and improve the odds of reaching an early settlement.<sup>16</sup>

At first, the up-front commitment of resources may worry companies. Throughout the implementation of the negotiation counsel model, however, it is crucial to distinguish between legal expenses and total claim costs. Although the former is the more immediate of

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16. Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 249 (2004) (“Often in negotiation, reaching an agreement may be difficult because it is unclear whether a mutually beneficial solution is possible; negotiators must exchange enough information to ascertain that a positive bargaining zone exists. If negotiators perceive little basis to trust the other party, they are unlikely to successfully exchange the information necessary to reach an agreement.”).

the pair, it is the latter that has the largest impact on the bottom line.<sup>17</sup> Accordingly, it is the latter that this model impacts the most. The reactive, bunker mentality commonly exhibited by corporations hoping to put off legal expenses usually ends up costing far more in money and time in the long run, even if the case is not tried.<sup>18</sup> Too often, settlements are concluded at mediations that have been scheduled too long after the accident, or even right before trial, after discovery and pretrial preparations have already taken their staggering financial toll.<sup>19</sup> By then, many of the benefits of this model will have long been undermined.

Clearly, the key to the negotiation counsel model's success is its emphasis on timing. Discussions between parties begin early in the legal process, before the claimant has spent a substantial sum of money on the case. Once a claimant has started investigations and has committed funds to their continuation, though, he has an added incentive to finish what he has started. Neil Sugarman, a lead claimant's attorney on the other side of one of my cases, noted that "[the general counsel] reached out to me early in the case but at an appropriate point to value worth and liability. [He came] at a point before either side became intransigent. It was the right time and the right place. There are targets of opportunity for settlement negotiations."<sup>20</sup> Taking this into account, the negotiation model approaches the injured party before he becomes too invested in bringing the case to court.

Interestingly, by identifying the interests of all the parties and working collaboratively to explore possible solutions, this model also transforms negotiation into a shared process where each party has a

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17. Quantification and effective communication of the savings resulting from this new paradigm are crucial to the long-term success of this model. Commonly, corporate decisionmakers value savings far more when they are quantified.

18. An additional reason for employing "delay-and-reaction" as a defense strategy results from inside counsel being tasked with more than they can possibly do. This is a common mistake in resource allocation within corporations. Even able and dedicated inside counsel are often so overworked that they spend much of their time moving from crisis to crisis. A frequently employed default defense strategy is to pay outside counsel to "keep a lid on the case" until inside counsel has time to take a careful look at it.

19. Telephone Interview with William D. Foster, Foster & Assoc., in Minneapolis, Minn. (Sept. 4, 2006). ("There's a need for a change in the approach [to] catastrophic injury. There's a tremendous amount of waste in the system. Months, if not a year, in advance to beginning settlement discussions or mediation, the information necessary to settle a case exists. I still see it as a bad habit that 30% to 40% of the cases I mediate are only two or three months away from trial.")

20. Telephone Interview with Neil Sugarman, Principal, Sugarman & Sugarman PC, in Boston, Mass. (June 1, 2006).

vested interest in the acceptance of the agreement. Through a process of incorporation and attention, the negotiation counsel invests the claimant in the goal of reaching a reasonable settlement, thus reducing unpredictable variables and more effectively sealing the deal.

C. *The Negotiation Counsel's Conduct: Relating to Attorneys and Claimants*

1. *Professional Relationships*

Negotiation counsel works with trial counsel to represent the interests of the company. If negotiation counsel is also inside-counsel, she will typically direct the efforts of trial counsel. If she is outside negotiation counsel, she will work in coordination with trial counsel but on a separate track.

Trial counsel often takes the primary responsibility for managing the on-the-scene investigation soon after the accident, working with the company to coordinate the ongoing investigation, giving opinions about state law and court procedures, and handling discovery, pleadings, motions, trial, appeals and other aspects of the claim.

Meanwhile, negotiation counsel makes and maintains early contact with the other side and takes the actions set out in this article to promote an early resolution. Companies benefit from this two track approach. If negotiation counsel is successful, the matter is resolved at a reasonable amount earlier than normal. If not, the trial counsel takes over and the case is tried.

Flexibility is thus a crucial characteristic of the negotiation counsel model. In allowing for a two-track method encompassing litigation and negotiation, the model clears the path to settlement but leaves the option to litigate open. In contrast, the standard model prematurely centers on a single relational approach, focusing on trial and hard-nosed negotiation. It thus risks being accused of duplicity or deception should the initial relational style change. In terms of crafting adaptable, creative solutions, the negotiation counsel model produces more win-win outcomes and significantly reduces the risk of a lose-lose situations, whereas the standard model specializes in win-lose (zero-sum) or lose-lose (scorched earth) outcomes.<sup>21</sup>

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21. A negotiation counsel searches out win-win solutions in the cases that she negotiates. Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 113 (2005) ("A problem-solving negotiator who is creative does more than just try to settle the dispute.").

## 2. *Conduct and Contact*

Establishing rapport and credibility with the claimant and his attorney undercuts the distrust that builds up due to the constant gamesmanship of standard practice, enabling negotiation counsel to create an environment more amenable to the collaborative exploration of win-win solutions. Conventional wisdom dictates that the strongest negotiation strategy hinges on deception; even if you wish to avoid litigation, you are encouraged to give the impression that there is no possibility of settlement because you are committed to going to trial.<sup>22</sup> Such posturing, when adopted by both sides, fosters an atmosphere of acrimony, cynicism, and self-protection, rendering settlement negotiations virtually pointless. “Smoke and mirrors” strategies escalate costs and prolong cases, greatly delaying final settlement. Mediations lose sight of the merits of the case and instead surrender to a race to prevent the other attorney from gaining the tactical advantage. By taking ego off the table and constructing an environment of openness and candor, the negotiation counsel model decreases the need for posturing, utilizes time more efficiently, and increases the likelihood that negotiations will proceed in a more cooperative atmosphere.

Negotiation counsel should shun the adversarial, posturing approach to personal injury claims; instead, encouraging both sides to lay important cards, though not necessarily all cards, on the table in order to facilitate a reasonable and early settlement. She clearly expresses her interests, as well as those of her client, to the claimant’s team in a way that establishes common ground and encourages reciprocation. She is also forthright about obvious weaknesses in her case and strengths in the claimant’s. When undertaken capably, information exchanges and collaborative meetings can demonstrate a negotiation counsel’s willingness to attend to her own as well as the claimant’s time, energy, and other priorities. Honestly expressing genuine respect for the claimant’s reasonable interests in turn helps to establish a rapport with the opposing side based on mutual understanding and informed trust.<sup>23</sup> This human connection is critical to the success of a negotiation counsel’s efforts, as it diminishes the antagonism that frequently hinders timely reasonable settlements.

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22. See Jim Sullivan, *Advising Clients to Settle*, LITIG. J., 1986.

23. Telephone Interview with Ed McConnell, Founding Partner, McConnell & Tormey, in Amarillo, Tex. (Aug. 25, 2006) (“If I wasn’t convinced that Jim [Golden] was taking into account the interests of my client, we would not have proceeded in settlement discussions.”).

Initially, attorneys may be skeptical about building an open, face-to-face working relationship with the other side.<sup>24</sup> Normally, it is uncommon for the counsel of major companies to travel to meet and exchange information with the claimant's attorney due to unfounded fears of appearing weak.<sup>25</sup> This fear is inaccurate for several reasons. Firstly, as a result of front-loading cases, a negotiation counsel will often come to the table knowing more than normal about the relevant facts, law, venue, strategies, and experts to the case, as well as the claimant attorney's core competency, experience, negotiation style, "pet peeves," primary objectives, key motivations, relationships with peers, and other characteristics. This knowledge, combined with a reputation of negotiating fair settlements, will consistently command the opposing party's respect.<sup>26</sup> Secondly, whatever "weakness" the negotiation counsel may risk exposing is often offset by the gains in credibility achieved by her honest, direct approach.<sup>27</sup> In the end, a credible rapport, more than any show of invincibility, is a better tool for identifying and prioritizing the interests of opposing parties, which is a key element in crafting mutually satisfactory solutions.<sup>28</sup> Lastly, without meeting personally, getting to know each other, and exchanging key facts about the accident, attorneys on both sides are less capable of accurately assessing the merits of a case, on which reasonable settlements are ultimately based.<sup>29</sup> Ignorance of the merits weakens one's position far more than a simple exercise in honesty would.

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24. Interview with Robert Curley, President, Curley & Curley PC, in Boston, Mass. (June 1, 2006) (having been asked to set up a meeting with the opposing plaintiff counsel, Mr. Curley expressed skepticism over what could be accomplished).

25. Telephone Interview with Neil Sugarman, *supra* note 20 ("Jim [Golden] coming to me was not perceived as an effort at meekness. He didn't come in a position of weakness.").

26. Quietly demonstrating this knowledge and the resulting strategy without threats is important in establishing rapport and credibility. I have also found that saying what we both know but seldom verbalize is often helpful. The important thing in this situation is for negotiation counsel to be themselves. Pretense and posturing are counterproductive. Visiting the office of plaintiff's counsel also gives negotiation counsel an added opportunity to carefully observe the attorneys and others in the firm, their relationships with one another, and the office itself. Such observations often provide valuable insight into working methods, relational styles, achievements, and interests of the claimant's counsel, which in turn aids effective negotiations.

27. Telephone Interview with Neil Sugarman, *supra* note 20 ("[Jim Golden] came across as someone who truly wanted to solve the case. I didn't know Mr. Golden, who I now know to be very competent, ethical.").

28. Nadler, *supra* note 16, at 249.

29. Interview with David Parker, *supra* note 13.

These benefits show that the importance of mutually respectful relations between opposing counsels cannot be overlooked. Accordingly, a negotiation counsel should not be boastful, rude, or take unreasonable positions in written communication, phone calls, or face-to-face discussions. Proving her intelligence, strength, or “superiority” should not motivate her. She has assumed this model’s unorthodox measures because she is genuinely invested in reaching a solution that is beneficial to both parties, not aggrandizing her own ego. These sentiments, while not necessarily vocalized, should come through in a negotiation counsel’s demeanor and behavior.<sup>30</sup>

Such professional empathy is most needed in the area of attention given by the defendant company to the claimant’s emotional and physical needs. Because of this, negotiation counsel will ask questions – and carefully listen – to the claimant’s story to hear how the accident has affected his life, demonstrating a sincere interest in his perspective, well-being, feelings, relationships, and peace of mind.<sup>31</sup>

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30. Neil Sugarman is an attorney who practices in Boston. He has obtained many multimillion dollar awards for his clients and was chosen by his peers as one of Boston’s Super-Lawyers. SuperLawyers.com, <http://www.superlawyers.com/massachusetts/Boston/Personal-Injury-Plaintiff-General/browse> (last visited Jan. 29, 2008). He was the claimant’s attorney in a catastrophic accident claim involving Covenant Transport. He and the author settled the claim before suit was filed. He states: “He [Jim Golden] came across as someone who truly wanted to solve the case. I didn’t know Mr. Golden prior to the meeting. . . . There was no posturing at the meeting. I quickly got an idea of the appropriate level [of settlement] because it was clear that the opening offer was reasonable. The offer was not too small but was within the bounds of reasonableness. Also, it was clear that Jim had authority to settle the case. The conversation from the outset was possible because he was honest and straightforward. The initial contact is very important. [This type of resolution] is unusual. One reason it is unusual is that usually trial counsel asks for a mediator. Obviously, we usually have the intercession of a neutral party [mediator]. Although face-to-face discussions outside of that context are rare, they can be very successful.” Telephone Interview with Neil Sugarman *supra* note 25.

31. While these face-to-face expressions of empathy are rare, they are recognized by claimant’s counsel to be an important element of effective handling of a claim by the defendant. Brad Thomas, a successful claimant’s attorney in Atlanta, Ga., commented on the impact of a company demonstrating empathy. After reviewing an early draft of this article he commented: “Having a negotiation counsel like Jim Golden on a case would cause me to re-evaluate [the] case. As a claimant’s lawyer, when I try to value a case, I think about what this company is going to look like in front of a jury. If the company shows no concern for the victim and behaves in the normal corporate manner – deny liability and defend – the value of the case goes up if the corporation has behaved in a way that is uncaring, concerned only about the bottom line and not about the people . . . when people have died or been catastrophically injured. The more indifferent [they are], the more I enjoy it as a plaintiff’s lawyer. But a lawyer following the negotiation counsel model would trouble plaintiff’s lawyers for a few reasons. If they apologize, express remorse and take care of the victim, then I might never get the case, especially if they gain the trust of the victims. Also, if I do get hired, at trial it becomes harder to beat up the corporate defendant. People on the

Where appropriate, she arranges for the provision of no-strings-attached funds to support immediate needs resulting from the accident, including medical expenses, funeral costs, travel, housing, and grief counseling.<sup>32</sup> By expressing genuine compassion and other human qualities, while moving toward practical solutions informed by common sense, equity, and the shared interests of both parties, the negotiation counsel can make great strides in establishing a relationship of goodwill and informed trust between the parties. Gestures of sincere concern are more than offset by savings in claims costs, particularly in cases where the defendant's liability is clear. In terms of claimant relations, a sincere showing of human compassion and regret can go a long way.

Should negotiation counsel's offer of early financial assistance be accepted by the claimant, she should make sure the funds are provided promptly, preferably prior to the agreed to date for delivery to further build credibility and rapport.

#### D. *Crafting Solution-Oriented, Creative Agreements*

Negotiation counsel approaches the issue of settlement in a collaborative, problem-solving manner, often in open brainstorming sessions that allow for all parties to play a role in shaping an agreement. These sessions grow out of a sense of understanding between the attorneys and a mutual acknowledgment that the normal negotiation strategies may not serve the interests of either side's clients. In the absence of needless maneuvering, the parties can lower their barriers, as less attention is paid to the gamesmanship of negotiation, and more to the substance of the overlapping interests. These early brainstorming sessions may produce a roadmap for future interactions, help each side to understand the other's motives and concerns, or even result in a settlement.

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jury are going to see the company come across in a more positive light. The jury will not turn around a big verdict. Also, sometimes for the family it's not about the money in catastrophic injury cases. They just want to be heard. If there's an apology coming out of the defendant, it will take the steam out of the claimant's case. They will become more willing to settle sooner and for less." Telephone Interview with Brad Thomas, Senior Vice President/General Counsel, Leaders Legacy, Inc., in Atlanta, Ga. (Sept. 4, 2006).

32. The provision of no-strings-attached funds to meet immediate needs is unusual in the traditional model of handling claims, even in cases where the liability of the company is clear. Bill Foster, a mediator in the Twin Cities area of Minnesota who conducts over 350 mediations per year, states: "I have been shocked at how reluctant insurance companies and self-insured companies are to fronting cost for fear of being perceived as weak. All it does is continue to antagonize the plaintiff and make it more difficult to settle." Telephone Interview with William D. Foster, *supra* note 19.

Should the claimant prefer to interact in a more formal setting, negotiation counsel also inhabits a unique role during mediations when she is not afraid to utilize “back channels”<sup>33</sup> to avoid some of the pitfalls of traditional mediating. While the mediator typically plays a crucial role, there are times when direct contact through a back channel is the only way to break an impasse. Having already established an informal working relationship with the claimant’s team, the general counsel should now have freer license to shuttle between the parties and develop agreements that would otherwise be prevented by attempts to preserve professional image, or meet the misplaced expectations of clients or opposing parties.

As a starting point, a negotiation counsel first identifies and prioritizes the other side’s interests. Many attorneys simply assume that they know what the other party wants. Yet the opposing side’s interests are not always exclusively economic. People make decisions based on a whole litany of reasons some of which are unrelated to money, especially in a catastrophic accident case.

Identifying the interests of the opposing party, including those that are important but less obvious, can often lead to a win-win for both sides, resulting in low-cost, high-benefit exchanges. Some claimants, for example, desire “emotional compensation”: a simple, sincere apology and acceptance of guilt, or at the very least an expression that the defendant is genuinely sorry for the accident and loss that ensued. If a death has occurred, their interests may lie in an annuity, a memorial to the person who has died, or an initiative to stop similar traffic accidents through a change in company practice. Identifying the claimant’s interests can help a negotiation counsel to craft nuanced, structured settlements, designed to address the claimant’s spectrum of individual needs and garner his favorable response.

By focusing on a reasonable agreement rather than self-promotion during negotiations, the negotiation counsel model diminishes the chances that settlement will be rejected as a matter of principle. The model not only offers parties the opportunity to be heard, it requires negotiation counsel to listen to, internalize, and act upon the claimant’s priorities. This helps to meet the claimant’s desire to air his grievances in a legitimate forum. That is, the model lessens the need for the claimant to “have their day in court” and increases the chance of a settlement’s success.

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33. “Back channel” refers to direct communication between negotiation counsel and the other side’s counsel outside the presence of the balance of the defense and claimant’s team.

The interests of claimant's counsel usually include being treated with respect, honesty, and professionalism as well as economic interests. Attorneys in hotly contested cases regarding personal tragedy generally expect the worst behavior from the other side. However, the cooperative methodology and mentality proposed by the negotiation counsel model has the power to change the climate dramatically. In my experience at Covenant, and as outside negotiation counsel for other companies, I have found that defense attorneys and claimant attorneys with whom I worked see this approach as a refreshing change.

#### E. *Fostering Acceptance of Agreements*

This final step requires the most art on the part of the negotiation counsel. The success of a settlement not only depends on crafting the appropriate agreement, but also identifying the moment at which it should be sealed. Perceiving the pivotal decision point requires a hypersensitivity to the readiness of key decision-makers. At this point, a negotiation counsel generally says little and listens carefully. She brings everything she's learned about the emotional, human, and pecuniary priorities of the other parties to bear on her choice of timing and approach. Drawing upon the rapport that a negotiation counsel has cultivated from the beginning, she must also improvise during the final, critical meetings, using candor, spontaneous humor, and simple statements about small ironies to which the other party can relate in order to navigate awkward moments and close an agreement. Finally, she appeals to the sense of ownership the other party has cultivated from all the input and effort put into their prior exchanges.

In one particularly tragic case I handled, a woman had sustained a severe and commonly irreparable brain injury. At the mediation, I could sense that the parties were caught at an impasse but just needed something additional and heartfelt to win them over. I suggested that, should the family decide to take a chance on new treatments in the future in hopes of improving the injured woman's condition, the company would cover those costs up to a certain limit. That tipped the balance of the argument towards closing the settlement.

The negotiation counsel's informal capacity as back-channel negotiator helps her foster acceptance of agreements. In high-stakes catastrophic accident mediations, large numbers of people are often present for both sides. After an opening session where the mediator explains the process, the claimant team and the defense team are

separated in two different rooms. The mediator shuttles between the rooms delivering offers and counter-offers and making arguments on behalf of each side to the other side. The claimant's room may include one or two attorneys plus several family members and/or family friends and advisors. The defendant's room may be occupied by one or more trucking company executives, trial counsel, negotiation counsel, a representative of the company's insurance carrier or third party administrator and/or a structured settlement advisor.

Attorneys in both rooms may feel a need to posture or strongly reject the latest counter-offer or argument from the other side when they are speaking to the mediator in front of the large group sitting in their room, even if the merits of the matter do not support such a response. This is often a function of the group dynamics and the attorneys desire to appear zealous in representing her client's interests. Such dynamics are often major obstacles to settlement.

In the new model, the negotiation counsel has typically spent a significant amount of time in two or three face-to-face meetings with the claimant's counsel prior to the mediation. She has already worked together on a number of occasions to arrange a meeting with the claimant or his counsel to deliver a message of sorrow for the tragic loss or in some cases an outright apology. In many cases, negotiation counsel will have listened to the claimant speak at length about how the accident has changed the lives of the family. Other meetings between negotiation counsel and claimant's counsel have ideally dealt with immediate economic help for the claimants, voluntary exchanges of documents, and in-depth discussions of the needs and interests of both clients. All of this contact in an empathic and respectful environment results in a working relationship marked by high levels of mutual credibility and rapport.

Because of this relationship, the negotiation counsel can approach claimant's counsel in private at the mediation to informally brainstorm potential solutions to negotiation impasses. These one-on-one back channel discussions allow negotiation counsel and claimant's counsel to "float" potential solutions without committing to them and to speak informally and creatively about potential points of agreement.

Once the negotiation reaches a critical point, I often use a back-channel discussion with claimant's counsel to offer to strongly recommend a certain settlement number to my client so long as claimant's counsel will do the same. If we agree to do so, the case frequently settles at that number. In cases where one party agrees to the number recommended by their counsel and the other party does not, the

agreeing party is not disadvantaged as it would have been if the proposed settlement had been expressed as a formal offer, through the mediator. This distinction between a counsel recommended number and a formal offer is important, because if the defendant makes a formal offer that is rejected, it becomes a floor from which the defendant must generally negotiate upward. If the claimant makes a formal offer that is rejected, it becomes a ceiling from which the claimant generally must negotiate downward. Both sides wish to avoid the risk inherent in creating such a floor (defendant) or a ceiling (claimant). This is especially true near the end of the negotiation when actions of both sides are extremely important to the final outcome. The ability to generate informal settlement numbers through back channels mitigates the risks associated with a potential rejection of a formal offer. This is one of many ways in which negotiation counsel's rapport with claimant's counsel adds value in mediation.

Finally, the good will generated by the negotiation counsel takes a lot of the energy out of the other parties' resistance to a reasonable agreement. Such resistance is often emotional in nature and stems from the acrimony generated by the traditional model. In many cases such emotions, rather than logic or the merits of the case, pose the largest obstacle to a reasonable settlement. The negotiation counsel's patience, calmness, honesty, empathic listening, and refusal to state and restate the weaknesses of the claimant's case are crucial in the final stage of the negotiation. Claimant's counsel is well aware of the weaknesses of their case and trial counsel has made it clear that the defense is aware of those weaknesses. To restate them at the moment of potential agreement is often counterproductive. In any case, it is not the negotiation counsel's role to do so, since the responsibilities of the trial counsel and negotiation counsel are separated into two tracks. On the one hand, the negotiation counsel has the flexibility and relational credibility to secure agreement to creative and reasonable agreements using low-risk methods. On the other hand, the trial counsel serves as the credible threat of a vigorous defense at trial if the first track fails. The two-track approach made possible by the negotiation counsel model offers more flexibility, less risk and more options for breaking an impasse.

## III. BENEFITS OF THE NEGOTIATION COUNSEL MODEL

A. *Legal and Economic Benefits*1. *Corporate Defendant*

The benefits of the negotiation counsel model to the corporate defendant are many. Firstly, the costs incurred by providing no-strings-attached funds for the immediate needs of claimants are more than compensated for by later returns. Frank Stackhouse who until recently served as the Vice-President of Litigation at Schneider National, the second largest truckload carrier in the United States with operating revenues of \$3.5 billion,<sup>34</sup> is an extremely experienced advocate of the empathetic approach at trucking companies. Mr. Stackhouse has found that “[d]oing things you don’t have to do or doing them long before you have to do them, especially where you make a significant cash advance to meet a legitimate need, buys you so much good faith and credibility that it positions you to either settle directly with the claimant or to get the lawyer to agree to a reasonable settlement.”<sup>35</sup> The idea that offering early financial assistance to claimants actually improves the company’s bottom line may seem counterintuitive, largely because goodwill is difficult to quantify. But shared experience has provided the numbers to support that claim.<sup>36</sup>

But providing funds for the immediate needs of the claimant is not just a demonstration of goodwill on the part of the defense; it is also a preventative measure against secondary and tertiary costs. Secondary costs are post-accident losses suffered by the claimants caused by the accident. One example is the loss of a home because of a failure to make mortgage payments where the primary earner is killed in the accident. In one case, the defendant company, who was clearly liable for a catastrophic accident, refused to front the cost of a bereaved family’s mortgage payment. The jury, sensing the anguish that the injured parties suffered from losing the roof over their heads in addition to their health, returned a verdict ordering the company to pay for the all the costs arising out of a foreclosure, including the costs associated with the “fire sale” price at which the house was sold.

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34. Schneider, National Inc. Announces 2005 Financial Results (Feb. 1, 2006) [http://www.schneider.com/news/AnnualRevs\\_Release05.html](http://www.schneider.com/news/AnnualRevs_Release05.html) (“Schneider National Inc., a premier provider of transportation, logistics and related services, today reported solid financial performance for 2005, achieving consolidated revenue growth and ending the year with \$3.5 billion in revenue, up from \$3.2 billion in 2004.”).

35. Interview with Frank Stackhouse, former V.P of Litig., Schneider National, in Green Bay, Wis. (Sept. 14, 2006).

36. See discussion *infra* section III.A.1.

The foreclosure could have been averted. The mediator of that case, William Foster, commented, “[The claimant] was going to lose his house because he could not work [due to injuries sustained in the accident]. If you had fronted \$50,000 or \$60,000, you could have bought a tremendous amount of goodwill. It could have saved the company half a million dollars. [The claimant] ended up losing his house and the company paid at least an extra \$500,000 for posturing and having to show artificial strength.”<sup>37</sup>

Similarly, refusing a claimant a motorized wheel chair, when he has lost his leg in an accident where the defendant’s liability was clear, does not serve anyone’s moral or financial interest. It certainly does not strengthen the defendant company’s case. Terrence Lee Croft, another mediator, noted that “[w]hen there is plenty of money to meet the needs of the injured party, [then] structured settlements, specialists, prostheses, physical therapy, special equipment and training, and the like can best be used as soon as they are needed, not after years of litigation.”<sup>38</sup>

The negotiation counsel model may increase initial legal costs, but it does so in order to reduce the much larger long-term legal and other costs associated with delayed mediation, discovery and the risk of trial. The negotiation counsel model acknowledges the fact that, in court, jury verdicts are the legal equivalent of a gaming table. The claimant may be awarded far too little or far too much, and the best experts are frequently hard-pressed to predict which. On the other hand, the standard approach does not shy away from large expenditures of resources. It remains wedded to cumbersome procedures like formal discovery that typically provide very little benefit per dollar expended. On balance, while the current standard emphasizes short-term, tactical advantage, the negotiation counsel model looks toward long-term, meritorious objectives.

Further, by “doing the right thing” in accepting responsibility where it exists, providing fair compensation, and remunerating claimants for immediate needs during the course of legal proceedings, companies following the negotiation counsel model also benefit from eased relations with the claimant’s team. The model encourages the extension of apologies and the expression of remorse, which “take the insult out of the injury.”<sup>39</sup> Even if the monetary value of an offer for

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37. Telephone Interview with William D. Foster, *supra* note 19.

38. E-mail from Terrence Lee Croft, Mediator, King & Croft, LLP. (Aug 18, 2006, 8:12 PM) (on file with author).

39. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1019 (1999). (“[F]ailing to apologize following an injury can be a deeply disrespectful

settlement satisfies the pecuniary needs of the claimant, he may nevertheless reject it if the defendant company failed to show enough regret or human compassion to satisfy the claimant's sense of justice.<sup>40</sup> Apologetic gestures mollify claimants and slow the momentum towards high-stakes litigation, increasing the chances of successful and reasonable settlements.<sup>41</sup> "Indignity can be a large barrier to compromise, and in many cases, an apology is needed before other aspects of the dispute, such as monetary compensation, can be settled . . . . '[At] times, an apology alone is insufficient to resolve a dispute, but will so reduce tension and ease the relationship between the parties that the issues separating them are resolved with dispatch.'"<sup>42</sup>

In addition, relatively small travel and time commitments, combined with sincere expressions of sympathy, can make or break a claimant's willingness to negotiate. As Edward McConnell, a claimants' counsel in a case I negotiated, recalls, "I invited [the General Counsel of Covenant Transport] to go to New Mexico and meet with the family [of the injured party], see her in rehab, and talk with her doctors. McConnell said 'If you fly out here. We'll drive out from the airport together.' I took him to [the rehabilitation center] . . . he talked with both the therapist and doctor. He was very gracious during the entire time. He apologized on behalf of the company to the family. He even played games with the two children. That was the last thing I needed. [The General Counsel] did a fine job of putting a face to a soulless and bloodless corporation." The settlement concluded successfully.

In facilitating the process, eased relations with the claimant often result in earlier settlement of cases, thus diminishing the risk of a large award by a runaway jury. Claimants are also often willing to take a somewhat smaller amount at the earlier time as long as the compensation is reasonable. Due to these savings, insurance premiums also decrease. Mark Whitehead is the Vice-President of Claims and Litigation Management at J.B. Hunt, the third largest truckload carrier in the United States with operating revenues of \$3.33 billion

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act and thus become a second injury. Indeed, some injured parties attach far more value to an apology than to compensation for their injuries.").

40. See Interview with David Parker, *supra* note 13; see also William F. Coyne Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 399 (1999) (suggesting that a barrier to settlement is sometimes a party's sense of justice).

41. Cohen, *supra* note 39 at 1019 ("An apology can be an important step in preventing future antagonistic behavior, including litigation.").

42. *Id.* at 1020-21 (quoting Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOT. J. 221, 221 (1987)).

in 2006.<sup>43</sup> A leading proponent of the empathetic approach, Mr. Whitehead states that “on large claims our costs have decreased by 15% to 30%.”<sup>44</sup> Likewise, Schneider National Carriers, coming from a high litigation count prior to the implementation of their empathetic model, now settles more than 98% of cases where suit is filed.<sup>45</sup> Most claims at Schneider, even catastrophic ones, are settled before suit is even filed.<sup>46</sup>

Covenant Transport’s experience with the negotiation counsel model has been so positive, it recently received a \$1,000,000 insurance premium rebate from its excess insurance carrier, Lloyd’s of London, led by the Wellington Syndicate. In the words of David Parker, CEO of Covenant Transport, “Because of this empathetic, proactive approach, our claims costs have been reduced by millions of dollars. We have also benefited from the better claims experience in our relationship with our insurance carrier. This approach contributed directly to a \$1,000,000 insurance premium rebate we recently received.”<sup>47</sup> Frequently, reductions in claims costs go right to the company’s bottom line dollar for dollar.

A final concrete indicator of benefit is the time and energy saved by in-house counsel, which can be redirected to a variety of more productive tasks. Instead of being bogged down with the complex formal discovery, in-house counsel can use the time freed up by increased settlements to pay due diligence to contracts or merger discussions. This is of particular importance because of the extensive time and resources required to comply with the new federal rules concerning e-discovery and similar changes in state court rules and decisions. By carefully incorporating the needs and desires of both parties, while eschewing the legal wrangling that disrupts so many claims, the negotiation counsel model increases the likelihood that an early and equitable result will be reached in a given case.<sup>48</sup>

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43. TRANS. TOPICS, TRANSPORT TOPICS TOP 100 FOR-HIRE CARRIERS 2007, at 7 (2007), available at <http://progressive.playstream.com/truckline/progressive/TT100For-Hire8-27.pdf>.

44. Telephone interview with Mark Whitehead, VP. of Claims and Litig. Mgmt., J.B. Hunt Transp. Servs., Inc., (Sept. 4, 2006).

45. Interview with Frank Stackhouse, *supra* note 35.

46. *Id.*

47. Interview with David Parker, *supra* note 13.

48. See E-mail from R.H. Lovin, Senior VP. of Admin., Covenant Transp. (Sept. 7, 2006, 6:21 PM) (on file with author) (“When you add the empathetic approach to the other effective negotiation methods employed by Jim Golden and the rest of our legal team, you have a recipe for success. At the end of the day, we have two rewards: the claim is settled for a reasonable amount and we know we did our best to do the right thing.”).

## 2. *Claimant*

Assenting to work with a negotiation model incurs few costs on the claimant's side, while reducing the risks associated with going to trial. For the claimant, earlier settlement supplies money that prevents secondary and tertiary harms associated with financial difficulties during legal proceedings. He also saves on the cost of litigation, which typically comes out of the final award handed down by the court. By working with a negotiation counsel less of his reward is lost to unnecessary transactional costs. In addition, a much earlier settlement could potentially give claimant the opportunity to work out a more beneficial share of the award with his counsel.

### B. *Non-economic Benefits*

#### 1. *Corporate Defendant*

The work of negotiation counsel results in improved public relations and a track record for reasonableness. Reputation earned among mediators and counsel can constitute real value when future transactions are taken into account. Permitting the depositions of company representatives, like the CEO and CFO, who do not specialize in handling personal injury cases may produce inconsistent or uninformed statements with the potential for inadvertently damaging the company's reputation. Such depositions occur less frequently when the claim is settled sooner and with less acrimony.

Negotiation counsel can also contribute to reconciliation between those affected by the accident. Truck drivers involved in tragic accidents, for example, may benefit from a more complete emotional recovery from trauma where the negotiation counsel carries them a message of forgiveness from decedent's family.

The negotiation counsel's commitment to a front-loaded and thorough investigation has benefits beyond their use in a particular legal case. The results from these investigations can sometimes be used by the company to prevent similar accidents. This saves lives, avoids injuries, and minimizes costs proactively rather than reactively.

Furthermore, improved morale across the board may be a result of working for an early equitable solution, whether ethically, emotionally, or financially. Legal staff will likely approach their work with more vigor and enthusiasm.

Lastly, in many catastrophic accident cases, the human element is minimized – or even eliminated.<sup>49</sup> The emotional, relational dimensions are swept aside. The negotiation counsel model, however, creates an environment that tends to “humanize” the process and the relationships among everyone involved. This personal engagement cannot change the facts of death or injury, but can greatly expedite the process of reaching equitable settlements and enabling everyone involved to move forward.

In particular, negotiation counsel can have a profound effect in humanizing the company that is accused of wrongdoing. The company is no longer an intangible legal entity when negotiation counsel performs their role properly. Negotiation counsel “fleshes out” the company, which takes on the personality and human compassion embodied in the negotiation counsel. As negotiation counsel, my goal is to connect with other human beings. Being in physical proximity to the claimants and their counsel – and doing a lot more listening than talking – is an important element in bringing a human dimension to a litigation/negotiation process that often accomplishes quite the opposite.

## 2. *Claimant*

Jumpstarting the settlement process can help the claimant begin his emotional recovery sooner. Throughout his interactions with negotiation counsel, the claimant and his legal team are treated with respect and offered the opportunity to be heard. The negotiation counsel’s creative approach that includes crafting win-win or no-cost high-benefit solutions may better incorporate the claimant’s non-monetary interests. Where an apology or expression of regret can go far in helping a claimant to heal emotional wounds, the negotiation counsel model provides for it.

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49. Telephone Interview with Denise Godfrey, Legal Servs. Adm’r, Covenant Transp. (Sept. 4, 2006) (“I have elevated job satisfaction because I know we are doing everything we can to help people involved in accidents. We are allowed to be human and relate to the claimants rather than being forced to treat them as case file numbers. We use strategy and think about how to approach people. We deal with people on a real level rather than just a file level.”).

#### IV. OBJECTIONS TO THE ADOPTION OF THE NEGOTIATION COUNSEL MODEL

The negotiation counsel model represents an unorthodox departure from the conventional approach to handling catastrophic accident cases in the trucking industry. As such, critics have put forth varying challenges to it. I address the primary ones in this section.

##### A. *Practicality*

The leading critique accuses the negotiation counsel model of being “impractical.”<sup>50</sup> These opponents allege that while the model sounds good in theory, it does not work in practice. In fact the opposite is true. While the strategies of negotiation counsel seem idealistic on a theoretical level, they have proven quite effective in practice.

Along those lines, the opposing attorney may turn out to be a master Machiavellian deceiver who has no qualms about manipulating with this approach. Such an attorney may use your information against you in trial when he might have had to work hard for the disclosure otherwise. However, Covenant Transport’s experience has been that these situations are extremely rare,<sup>51</sup> while J.B. Hunt Transport Services’ Vice-President of Claims and Litigation Management, Mark Whitehead, finds that an unreasonable response happens only a quarter of the time.<sup>52</sup> Mr. Whitehead adds that establishing early contact helps to counterbalance any resulting disadvantage, in that the negotiation counsel approach “allows us to make an early determination of how we are going to defend the suit. It helps us strategically because it gives us clues as to who we need to take early depositions of and other early discovery that can be

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50. According to one CFO at a General Counsel Forum: “I thought that Jim Golden’s presentation was the best of those presented; however, in discussing this presentation after the fact with attorneys in attendance, I was told that his arguments weren’t practical. I would have liked to see this discussed/argued.” I hope that at the conference next year there can be some good-natured “debate” on this issue.

51. See E-mail from R.H. Lovin *supra* note 48 (“Some people may say that this approach is not practical. However, that has not been our experience. First, our claims are closed faster. Second, we experience significant savings in claims costs.”).

52. Telephone interview with Mark Whitehead, *supra* note 44 (“You only get taken advantage of if you allow someone to take advantage of you. Plus, [this technique] gives you an early read on whether they want to do the fair thing or they just want to get rich regardless of the merits. If people take an unreasonable position, it allows us to make an early determination of how we are going to defend the suit. It helps us strategically because it gives us clues as to who we need to take early depositions of and other early discovery that can be done. We even do pre-suit discovery in some cases. However, an unreasonable response only happens one out of four times.”).

done.”<sup>53</sup> The negotiation counsel model settles a vast majority of its cases reasonably, while preparing the company well for “unreasonable responses.”<sup>54</sup> It would be a poor policy to base an entire corporate legal strategy on a contingency that happens so infrequently as to hardly ever impact the company, particularly when the company is more than capable of handling the event should it arise.

Others argue that the model only works in certain cases, with certain personalities. I agree that the negotiation counsel must have the characteristics and skills described in this article. However, I have successfully used this model with all sorts of personalities as claimant’s counsel and claimants. Often, my approach is so initially disarming, people are taken aback, at which point their instinctively defensive posture wavers. That opens a window for an honest, pragmatic dialogue that sweeps away the usual legal maneuvering and sets the stage for practical negotiations. The vast majority of the time, people find this refreshing and tend to reciprocate.

The practicality of this approach is established at Covenant Transport and by Covenant’s excess insurance carrier, Lloyd’s of London, led by the Wellington Syndicate.<sup>55</sup> It has improved the bottom line for the company and saved millions in claims costs.<sup>56</sup> Overall, the model is less wasteful of the time and resources of all parties involved. Moreover, everyone typically leaves the table feeling good about their contributions.

It is true that, in order for this model to work at its best, it requires competent counsel on both sides to assent to the risk of voluntarily going against the grain. In the absence of competent counsel, people are sometimes unreasonable to a point at which no amount of restructuring dispute settlement policy will help.

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53. *Id.*

54. *Id.*

55. E-mail from Peter Harris, former underwriter, Wellington Syndicate of Lloyd’s of London (Sept. 12, 2006, 7:38 pm) (on file with author) (“Wellington underwrites a large book of trucking liability and currently leads five of the top ten Truck Load Carriers [in the United States]. As part of their underwriting process Wellington specifically consider[s] how trucking companies deal with accidents and how they interact and assist injured or deceased third parties and their families. Wellington believes in the empathetic problem-solving methodology of claims handling . . . Wellington has assisted clients in changing their claims methodology. [T]he clients that have employed the empathetic problem-solving approach to claims are benefiting from earlier and less costly settlements. We in turn are benefiting.”).

56. Interview with David Parker, *supra* note 13.

## B. *Displays of Weakness*

Upon hearing of the negotiation counsel model's unusual strategies, some attorneys fear that the willingness to settle, establish contact with the opposing party, or exchange information may be interpreted as irreparable displays of weakness.<sup>57</sup> For many, the potential sacrifice of a tactical advantage is not worth the risk to the outcome of the case or their own legal reputations.<sup>58</sup>

My use of the negotiation counsel model does not create a perception of weakness and therefore it does not prejudice my bargaining position.<sup>59</sup> Before it ever becomes an issue, it is mitigated by the presence of excellent trial counsel, who the claimants know will fight tooth and nail if deployed.

Many attorneys fear appearing weak. As discussed in previous sections, though, a combination of thorough preparedness, powered by heavily front-loaded investigations, alongside a reputation for negotiating fair and efficient settlements, and a straightforward, non-deceptive approach, tend to demand the opposing counsel's respect. In our meetings, Neil Sugarman observed that "neither side did much posturing. That is how cases deteriorate. Each of us had a good knowledge of both sides. We studied each other, realized the integrity of [the] other, had meaningful conversation . . . took each other into account. I recognized that the other party was being too good a lawyer to fail to account for anything."<sup>60</sup> The proper implementation of the negotiation counsel model easily allows for effective displays of control, authority, and competency, while clearing the table of obstructive game play.<sup>61</sup>

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57. William Coyne argues that toughness does work and a lawyer employing a hard-bargaining technique would not want to appear to be coming to the table to negotiate in a vulnerable situation. As Coyne cautions, though, tough-bargaining only works sometimes and rarely insures the optimal result. Coyne, *supra* note 40, at 399 ("The lawyer making the initial contact about the dispute, not knowing how the other side will act, may in good faith conclude that toughness, perhaps even intimidation, is the best approach even though chances of a prompt settlement (which may be the best result for both sides) are diminished.").

58. *Id.* at 389 (discussing importance of litigator image).

59. Telephone Interview with Neil Sugarman, *supra* note 25.

60. *Id.*

61. Interview with Frank Stackhouse, *supra* note 35 ("[I]f you say I want to talk early there may be someone who might presume you are going to overpay for the claim. I tell them we are going to be fair and offer a reasonable dollar but don't expect us to overpay just because we are being nice. If they still refuse to discuss reasonable numbers I say, 'With all due respect to your client's loss, we think this is what is fair and if you think it is worth more we will agree to disagree and respect your decision.' Then there is always that last go around when you are tested to give them \$100,000 or \$250,000 more than the claim is worth. When you say 'No, we have given you our

### C. *Disclosure*

Many detractors think that by sharing information that is important to the case, it necessarily follows that you must disclose everything. The negotiation counsel model encourages both parties to voluntarily exchange information at an early date. However, it does not assume that either party will necessarily reveal all the information available to them. The decision about what information is exchanged is not taken lightly. At times, a negotiation counsel may require a meeting with senior management and the rest of the defense team to discuss their disclosure before moving ahead. Nevertheless, upfront disclosure and communication is critical to the success of the negotiation counsel model because it reduces the false leads that would have wrongly been considered important absent this approach, saving precious time and money.

### D. *Inertia*

Admittedly, the type of systematic and basic change proposed by the negotiation counsel model requires energy and effort to implement.<sup>62</sup> Shaking the foundations of the deeply entrenched, adversarial tradition of catastrophic injury cases clearly poses a challenge. The idea that the truth and equity emerge from the fires of controversy is embedded deeply in the professional legal psyche. Companies are also mired in the mindset that stringing cases along gives their float (money set aside for future claims) more time to accumulate interest.

Staying with the old regime is easy. Companies don't have to be proactive in that model as they have to with the negotiation counsel approach.

Finally, the adoption of the negotiation counsel method requires emotional fortitude. It is difficult to face the families of individuals injured in tragic accidents.<sup>63</sup> There, an ounce of empathy will affect

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best number,' it is important that the eye contact and the body language convey that you mean what you say. The credibility that you have built up really counts then. You have to be willing to try some cases where they refuse to be reasonable.”)

62. See E-mail from R.H. Lovin, *supra* note 48 (“Historically, we’ve been taught that if liability is likely a threat, we should never admit anything that might imply fault. However, if we are to genuinely reach out to the injured people, many of these notions must be abandoned. [A] paradigm shift is required.”).

63. *Id.* (“I could expand on the many difficult visits that my staff and I have made. But suffice it to say they are not the most pleasant situations. They are not your typical ‘business as usual’ appearances at funeral homes [or] introductions in ICU waiting rooms; visits to family member’s homes in such times are difficult.”)

you immensely. Under standard procedure, trial counsel doesn't have to deal with that.<sup>64</sup>

Granted, the negotiation counsel model has an emotional cost. It requires steady commitment and a sea change in the traditionally combative legal mentality to work. The model has the potential to reward its participants with tremendous emotional satisfaction.

#### E. *Personal Risk*

The status quo is also safe; if you are the one controlling the litigation and something goes wrong, you can simply blame it on the traditional system. But once you introduce a new element, any failure is attributed to your innovation, whether or not it was truly at fault.<sup>65</sup> I believe that any personal risk is mitigated or obviated altogether by the positive economic results of this model.

#### F. *Advantages of Delay*

Some defendants thrive on the effects of prolonging a catastrophic injury case. They therefore question the benefit of the negotiation model's time efficiency. A case is strengthened, in their minds, as information becomes lost, witnesses pass away, or their recollections fade.<sup>66</sup> Delaying litigation and compounding the costs of discovery also increases the chance of bankrupting the opposing side. Using these techniques, procedural maneuvering can win a case that would otherwise be destined for a loss.

Ethical issues aside, this reactionary method is hardly a surefire strategy for legal success. It depends on luck, coincidence, and other factors completely beyond the control of the defendant. In the event that none of these "fortuitous" circumstances arise, the company will be forced to swallow the superfluous costs and wasted time, as well as litigate the case at the risk of heavy losses. Here, the disadvantages of delay outweigh the limited advantages.

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64. Interview with David Parker, *supra* note 13.

65. Interview with Frank Stackhouse, *supra* note 35 ("Yes, more and more companies want to take this approach. However, many of them are afraid of the risk of doing things differently. Key people fear they will go out there and make a mistake or something will go wrong and they will be blamed because they changed the way things had always been done.").

66. Telephone Interview with Brian Wood, Partner, Lind, Jensen, Sullivan & Peterson, in Minneapolis, Minn. (August 23, 2006).

### G. *Genuine Concern*

Some concerned attorneys fear that this method can be manipulated to “trick” claimants into settling for less than their claim is worth, pressure claimants into a premature settlement, or tell the claimants not to hire lawyers.

Negotiation counsel, however, should be aware of these risks and work to avoid them at all cost. Though the claimant’s do not always elect to hire a lawyer, the choice is exclusively theirs and they do so in most cases. Any model of negotiation can be misused, however, this model is not intended as a tool for manipulation or deception.

### H. *Self-Interest of Agents*

In the context of civil litigation, clients typically pay trial attorneys an hourly rate. Because trial counsel make substantial sums of money during the discovery process, many observers question why they would volunteer for a model that would cut short their duties. As for claimant’s counsel, Robert Mnookin describes the complementary situation: “there is very little incentive for opposing lawyers to cooperate, particularly if the clients have the capacity to pay for trench warfare and are angry to boot.”<sup>67</sup> Trial and claimant’s counsel have plenty of reason to adopt the negotiation counsel method, however.

Consider the benefits of the negotiation counsel model to claimant’s counsel. Working with a negotiation counsel will increase the chances of an early reasonable settlement, thus saving valuable time while preserving earnings. The model also guards against an unpredictably low verdict after all is said and done.

As for corporate defense firms, competition among them is intense in today’s market. Anything a trial counsel can do to distinguish himself from others will help attract clients. The negotiation counsel model encourages trial firms to set up a separate practice area specifically for negotiation counsel or at least appoint one specialist, drawing from its bright talent pool. If this is accomplished effectively, firms can potentially attract more business. The extra service can help to offset the decrease in average claim duration resulting from the implementation of the negotiation counsel approach.

Companies can also take some small steps to attract trial firms to the negotiation counsel approach. Firstly, they can affirm their company’s loyalty to them as they work with us to arrive at quick,

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67. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 242 (1993).

rational decisions. Secondly, they can recommend their services to other corporations as well as other inside counsel. Thirdly, companies pay trial counsel more money sooner as a result of the front-loading of cases. Doing so will authorize trial counsel to proceed faster and deeper with their investigation. Having the ability to do the reasonable and necessary investigation, research, and analysis on a timetable and in a sequence driven by reasoned legal judgments, common sense and efficiency offers trial counsel more personal satisfaction from a job well done and avoids the frustration resulting from the less efficient and more unpredictable “start and stop,” “hurry up and wait” model of traditional litigation management.

Finally, both defendant’s and claimant’s attorneys can benefit from a reputation for credibility and flexibility among inside-counsel. They will also likely experience a sense of accomplishment by being part of a team that “did the right thing.”

## V. SIMILAR APPROACHES

This article considers that negotiation counsel acts as a representative for the defendant in catastrophic accident cases. However, negotiation counsel can be productively employed in a wide variety of disputes. The following are examples of similar approaches whose success bodes well for the adoption of the negotiation counsel model in other contexts and industries.

### A. *Settlement Counsel*

The standard path for the settlement counsel model is a two-track approach similar to the negotiation counsel model.<sup>68</sup> The settlement counsel is responsible for preparing the case for settlement while a lead counsel is responsible for preparing the case for trial.<sup>69</sup> The underlying concept behind this arrangement is having an attorney other than trial counsel attempt to resolve the dispute by negotiation before litigation commences in earnest. The fundamental purpose of using a settlement counsel is to avoid having a lawyer’s duty to settle interfere with his desire to litigate, which otherwise

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68. *Id.*

69. Coyne, *supra* note 40, at 409 (1999).

becomes aligned with his self-interest, both financially and psychologically.<sup>70</sup> The settling attorney is paid to explore settlement, knowing that another attorney will handle the case if efforts to reach a negotiated solution are unsuccessful.<sup>71</sup>

The negotiation counsel model differs from the settlement counsel model on two main levels. First, there is the issue of a negotiation counsel's commitment to pro-activity, timeliness, and early contact. Gaining the support of senior management, heavily front-loading investigations, taking such a strong initiative to reach out to the claimant, and initiating informal, yet authorized, pre-discovery exchanges of information are not typical duties of settlement counsel. A settlement counsel is often employed later on in the legal process, and even then, for short periods of time. Whereas negotiation counsel relies on long-term relationship-building, sometimes settlement counsel is given only 90 days before settlement aspirations are abandoned.

Secondly, the markedly greater relational and empathic element of the negotiation counsel model sets it apart from the settlement counsel approach. Attending funerals, visiting injured parties, disbursing no-strings-attached funds to attend to immediate needs, flying across the country to personally meet and actively engage with claimant's attorneys or family, consistently taking responsibility, and formally apologizing where fault is found are crucial elements of the negotiation counsel model. A negotiation counsel relies on taking the initiative without necessarily focusing on settlement at each step; many elements of the model are directed towards establishing a rapport between the parties. The resulting trust and respect pay off discreetly during settlement negotiations.

### B. *The Toro Model*

Based on the practice of Toro Company, a producer of lawnmowers and garden equipment, the Toro Model is a pre-litigation alternative dispute resolution program that makes use of in-house paralegals to research potential products liability claims within weeks of learning of them.<sup>72</sup>

The proactive legal representative immediately contacts the claimant's counsel to learn more about the case and the claimant's expectations.<sup>73</sup> They open by explaining that they are not lawyers

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70. *Id.* at 367

71. *Id.*

72. Miguel A. Olivella Jr., *Toro's Early Intervention Program, After Six Years, Has Saved \$50M*, 17 ALTERNATIVES TO HIGH COST LITIG. 65, 65 (1999).

73. *Id.*

but have authority to settle the case.<sup>74</sup> Toro's goal is early settlement. Face-to-face meetings permit the paralegal to express regret and apologize where he finds liability.<sup>75</sup> Open dialogue also helps the legal representative to craft the settlement relief to meet the exact needs of the injured person and his family without resorting to litigation. If ensuing negotiations do not produce an amicable solution, an offer of nonbinding mediation is made. It is almost universally accepted. The mediation normally takes about a day, overseen by a mutually agreed-upon mediator. If it fails, the claim is litigated in full force.

Over a period of three years, Toro handled over 80 products liability cases, 90-95% of which were resolved pre-litigation, either in direct negotiation or in non-binding mediation.<sup>76</sup> Defense and settlement costs have been slashed by more than fifty percent per claim, while the company has reduced its insurance premiums by \$1,000,000 per year.<sup>77</sup> Since the implementation of its program, Toro's revenues have doubled and its profits have tripled.<sup>78</sup> All in all, the company has saved at least \$50 million in litigation costs due to its ADR model.<sup>79</sup>

## VI. CONCLUSION AND POTENTIAL FOR NEGOTIATION COUNSEL MODEL IN OTHER AREAS OF LAW

The negotiation counsel model is not a panacea that results in prompt, efficient and equitable results in every case. Well-intentioned attempts to communicate earlier and more frequently or even an offer of no strings attached help can be misinterpreted. Determining an equitable value involves many subjective judgments, few bright line tests, and is a matter about which reasonable people can differ. Yet this model does offer more opportunities for earlier, more informed analysis, valuation, and identification of common interests (both economic and non-economic). It introduces efficiencies through voluntary reciprocal exchanges of information thus reducing incentives to file suit and pursue formal discovery. Finally, though it acknowledges that human motivations are often mixed, it does create

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74. *Id.*

75. *Id.*

76. *Id.* at 66 ("The settlement rate of claims handled through the program has increased to 95% from 90%. These settlements are taking place prior to or during pre-litigation nonbinding mediation.").

77. *Id.*

78. *Id.*

79. *Id.* The company estimated that over five years it has saved over \$50 million in litigation costs.

an environment where trying to “do the right thing” or “live and let live” is a more frequent motivation than is the case in the acrimony-laden “kill or be killed” traditional model.

The negotiation counsel model has proven more than effective in catastrophic accident cases within the trucking industry. If the model works in an industry that in an accident context has one-off relationships, then there’s potential for the successful use of negotiation counsel model in other areas of business. That is especially true where there are on-going business relations, or where risk needs to be obviated, costs lowered, and current practice makes settling unnecessarily difficult due the lack of flexibility and the increased animosity that result from the traditional litigation model.