



# If you love them, let them go

Withdraw as counsel and advise your client to proceed pro se. The carrier may low-ball them and open up the policy

BY PATRICK GUNNING

There is no conversation more frustrating than explaining to a victim of a catastrophic collision that their case holds little value due to the other party's inadequate insurance-policy limits. Although the client's damages may be worth millions, no full and fair justice can be obtained unless the insurance carrier declines to settle the case within the inadequate policy limits and thereby "opens" the policy.

Recently, our firm and referring co-counsel have embraced a novel approach in a catastrophic-injury case involving an underinsured driver where liability was disputed. Before a lawsuit was filed but after the defendant's policy limits were disclosed, co-counsel withdrew as the attorney of record and advised the client to pursue "opening" the policy via a settlement demand as an unrepresented pro se claimant. As a result of large insurers' well known institutional prejudices against unrepresented litigants, the defendant's insurer denied the plaintiff's claim in bad faith, the policy was opened, and ultimately a multi-million dollar settlement was obtained. I am sharing the method we used to accomplish this result in the hopes that you may find it useful in your practice.

## Facts of the example case

The case at issue involved an elderly man who was crossing the street near his home when he was struck by a negligent driver and sustained severe injuries, including hip and leg fractures requiring surgery, a significant traumatic brain

injury, necessitating past medical treatment and also injury requiring a spinal-fusion surgery. Medical costs were in excess of six figures.

Liability, however, was seriously in dispute, as multiple eyewitnesses presented contradictory testimony, with the defendant and one other independent witness claiming the plaintiff "darted out" from between parked cars and was not within the nearby crosswalk at the time of the incident. The defendant driver had a woefully inadequate insurance policy through a major auto insurer, was not in the course and scope of any employment, and had no assets or excess coverage.

## Initial steps

Co-counsel began working up the case by conducting the appropriate workup of a serious personal injury case – gathering witness statements, medical treatment and billing records, the police report, and formally requesting the disclosure of the defendant driver's applicable insurance policies and their policy limits. When the defendant driver's insurer revealed their inadequate policy limits for the catastrophic injuries at issue, counsel for the plaintiff had a choice.

In most situations, the attorney of record would then prepare a settlement demand package and demand the insurance policy limits. However, in this case, counsel correctly deduced that if the plaintiff was formally represented, the likelihood that the insurer would pay a policy limits demand was exceedingly high. After attorneys' fees, costs, and medical liens were taken into account,

such a settlement would have left the client with essentially no recovery. To maximize the client's potential likelihood of a full and fair recovery, counsel planned to voluntarily withdraw as attorney of record in the settlement correspondence and to allow the plaintiff and his family to pursue the matter pro se. This decision ultimately allowed the plaintiff to use the insurer's own bad-faith tactics against it, and to achieve full and fair justice.

## Taking advantage of unrepresented clients

It is no secret that the insurance industry wants claimants to be unrepresented in order to take advantage of them with lowball settlement offers and unfair denials of liability. After the widespread adoption of the "Colossus" computer program and other similar systems in the insurance industry in the 1990's and early 2000's, courageous whistleblowers came forward and disclosed many unethical practices of insurance companies and nationwide lawsuits by consumer attorneys further exposed their conduct.

For example, in nationwide class-action litigation, former Allstate employees testified that they were "trained to build rapport with customers and discourage them from hiring lawyers." (Bartelme, Tony. *STORM OF MONEY: Insider tells how some insurance companies rig the system*. South Carolina Post Courier. December 1, 2012.) This practice was and still is prevalent in the insurance industry. According to noted insurance whistleblower Robert Dietz, adjusters at Farmers Insurance were



“taught how to dissuade people from hiring a lawyer in the first place, “were evaluated annually for this talent,” and “whenever adjusters allowed claimants to retain an attorney, they had to fill out a form to explain to supervisors how they let it happen.” (Heckman, Candace; *Lowball offers nothing new in insurance industry*. Seattle Post-Intelligencer. May 14, 2003.)

While insurance companies treat an unrepresented pro se litigant differently in practice, the law holds pro se litigants to have equal rights under the law, and an equal right for their settlement demands to trigger an insurer’s duty of good faith and fair dealing to settle within the policy limits.

### **Representation is irrelevant to the insurer’s good faith duty to settle**

To prove insurance bad faith under California law for an insurer’s refusal to accept reasonable settlement within the applicable liability policy, a plaintiff must prove: (1) the plaintiff in the underlying case brought a lawsuit against the insured for a claim that was covered by their insurance policy; (2) the insurer failed to accept a reasonable settlement demand for an amount within policy limits; and (3) that a monetary judgment was entered against the insured for a sum greater than the policy limits. (CACI Civil Jury Instruction 2334.) “A settlement demand for an amount within policy limits is reasonable if the insurer knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on the underlying plaintiff’s injuries or loss and the insured’s probable liability.” (*Ibid.*) Because the implied covenant entails a duty to investigate properly submitted claims, “the insurer is charged with constructive notice of facts that it might have learned if it had pursued the requisite investigation.” (*KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 973.)

The reasonableness of an insurer’s actions towards a claimant’s demand is thus based on actual or constructive notice of the “injuries or loss” and the “insured’s probable liability,” not whether the claimant is represented by an attorney. Under the California Insurance Code and the California Code of Regulations sections pertaining to third party claims against auto insurance policyholders, no distinction is made in the duties owed by an insurer to a third party claimant based upon whether they are represented by an attorney or not. (See, e.g., Cal. Ins.Code § 790.03; Cal. Cal.Code Regs., § 2695.1 *et seq.*) Nor is there any such distinction made in the published case law on bad-faith claims. Thus, while as a matter of practice insurance companies frequently undervalue and ignore claims made by unrepresented claimants, as a matter of law their settlement demands have equal force and effect in opening a policy.

### **Counsel withdraws with client’s consent**

With client consent, referring counsel withdrew and the client pursued a policy limits demand as a pro se claimant. Fully aware of these factors and the normally hopeless situation facing their client, co-counsel pursued an unconventional and intelligent strategy. The client and his family were advised of the potential outcomes and obtained their consent to withdraw as counsel from the pre-litigation settlement discussions.

Prior to his withdrawal, counsel provided the clients with advice as to the form, content, and materials to provide in support of a policy limits demand. A new attorney/client agreement was formed, strictly limiting counsel’s role to ongoing, as-needed advice and guidance in drafting documents and responses necessary to pursue their pro se policy limits demand, and waiving counsel’s right to fees in the event the policy limits were paid. After this new agreement was

formalized, counsel wrote to the defendant’s insurance carrier and formally withdrew as counsel of record, advising that in light of the limited insurance proceeds the clients had elected to conduct settlement negotiations pro se and to contact the claimants directly on all further issues relating to the case.

### **This action did not violate attorney ethics rules**

The question many attorneys have when presented with this scenario is whether it creates ethical issues under the Rules of Professional Conduct or the Business and Professions Code. According to published case law and bar disciplinary opinions in California, the answer is no. Such an arrangement does not violate a California attorney’s professional ethical obligations.

First, “[t]here is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding self-representing lay persons in litigation matters, providing that the client is fully informed and expressly consents to the limited scope of the representation.” (L.A. Co. Bar Assn. Form. Op. 483 (1995); see also *Joseph E. DiLoreto, Inc. v. O’Neill* (1991) 1 Cal.App.4th 149, 158.) Any limitations on the scope of work to be performed by the attorney in this role should be stated explicitly and completely. (*Id.*; see also L.A. Co. Bar Assn. Form. Op. 502 (1999).)

Second, “there is no specific statute or rule which prohibits an attorney from assisting a client in the preparation of pleadings or other documents to be filed with the court, without disclosing to the court the attorney’s role.” (*Ricotta v. State of California* (S.D. Cal. 1998) 4 F. Supp.2d 961, 987-988; L.A. County Bar Assn. Form. Op. 483, March 20, 1995.) Nor are there published court decisions in California state or federal courts which have required an attorney’s disclosure to the court regarding his or her



involvement in preparing pleadings or documents to be filed by a litigant appearing pro se. (*Id.*; see also L.A. Co. Bar Assn. Form. Op. 502 (1999).) There are also no published California state case or ethics opinions holding that an attorney's preparation of a pleading or document for the signature of a party appearing pro se without disclosure to the court of the authorship of the pleading or document inherently involves deception or misleading of a court within the meaning of Business and Professions Code section 6068(d) or rule 5-200, Rules of Professional Conduct. (L.A. Co. Bar Assn. Form. Op. 502 (1999).)

Finally, the ethical standards referenced above refer to the filing of documents by the pro se litigant with the court, which imposes additional duties to the attorney under the Business and Professions Code. Under California's ethics rules and Business and Professions Code, neither a pro se litigant nor a lawyer retained by one are required to disclose such assistance, particularly as it would relate to pre-litigation communications or settlement demands. As a result, nothing in referring counsel's conduct created an ethical conflict, particularly since the limits of the new representation were expressly disclosed and full consent was given by the client.

### **The policy limits demand is rejected**

The pro se claimant sent a valid policy limits demand, which was ultimately rejected. In advice to the soon-to-be pro se claimant, referring counsel directed them to include the necessary components of any policy limits demand, (1) evidence to establish a likelihood of liability; (2) evidence to establish damages in excess of the policy limit; (3) a statement that settlement for the policy limits would release all claims, including loss of consortium claims; (4) a statement that all liens would be paid by the claimant, and (5) a time limit to accept. The claimant's family and

claimant provided the police report, a written under-oath statement by the claimant, his medical records, and medical billing documentation showing paid *Howell*-number special damages in the six figures.

The insurer responded in the usual fashion, demanding authorizations for medical records, Medicare, and additional time to investigate – all of which were granted. After multiple extensions were granted, the defendant driver's insurer reached a decision. Despite conflicting testimony and evidence over whether the claimant was or was not in the crosswalk, and damages valued in the seven figures, defendant's insurer completely denied liability and refused to pay the policy limits. Based upon past experience, this was a clear, unambiguous case where a client represented by counsel imminently threatening suit would have received a tender of the policy limits from the insurance carrier. Defendant's insurer, however, got greedy and refused to pay, opening the policy.

### **Counsel steps back in**

With an open policy in hand, the claimant and his family returned to their attorney, entered into a new attorney/client agreement, and filed a lawsuit. At this point, any attempt by the defendant's insurer to belatedly tender the policy limits was futile. "[R]ejection of an initial settlement offer is frequently regarded as a preliminary bargaining tactic, not as a break off of negotiations ... The injured party, however ... may take an initial rejection at face value and choose thereafter to submit his claim to the uncertainties of litigation ... Even if the insurer attempts to resume negotiations by a belated offer of the policy limit, that action does not necessarily relieve it of the onus of an earlier bad faith rejection." (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 797-8 (disapproved on other grounds); see also *Martin v. Hartford Acc.*

& *Indem. Co.* (1964) 228 Cal.App.2d 178, 185.)

Ultimately, our firm associated in this case as trial counsel, and resolved the matter for a confidential seven-figure settlement at mediation, despite very tough liability evidence and the client's advanced age. The settlement allowed the client to afford the substantial medical care and in-home assistance he will need for the remainder of his life, and to provide new opportunities for his family. In a situation where all too often full and fair compensation is impossible to obtain, creative lawyering (or in this case, creatively knowing when *not* to lawyer) allowed this client to receive justice and forced a major insurer to face the consequences for its bad-faith conduct towards pro se injury claimants.

### **When should you try this approach?**

Ultimately, there were several necessary factors in the example case that made this course of action a successful strategy. This technique for opening an insurance policy would potentially work well in future cases with (1) catastrophic injuries or wrongful death damages; (2) limited insurance proceeds; (3) disputed liability evidence, and (4) a good working relationship with the clients. However, too often cases that meet these criteria must be rejected or immediately settled for the inadequate policy limits, with the client denied any meaningful recovery. Any attorney willing to "let go" of some client control and attempt this method on an appropriate case could reap substantial rewards for their client.

Counsel in this example case took a real risk of not receiving their share of the limited insurance proceeds in attorney fees by allowing the clients to proceed with the pro se policy limits demand and, unsurprisingly, the large insurance carrier acted with callous disregard that the potential judgment against their insured was likely to exceed the amount of the demand based on the



underlying plaintiff's injuries or loss, even if the defendant were ultimately only found a small percentage at fault. Success with techniques like this can only help deter large insurance companies' ongoing efforts to take advantage of those who are unable to or purposefully discouraged from obtaining the



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competent representation they need.

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