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**1994 SOUTHERN SURETY AND FIDELITY  
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**NEGOTIATING TECHNIQUES FOR SURETY AND FIDELITY CLAIMS**

**PART I**

by

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## ACKNOWLEDGMENT

I want to extend my gratitude to Dr. Chester L. Karras and his seminar "Effective Negotiating", as well as his various publications for inspiring this paper. Dr. Karras' seminar is highly recommended by myself and in my opinion the money spent for it will be returned to you and your organization almost immediately upon completion of his course.

## NEGOTIATING TECHNIQUES FOR SURETY AND FIDELITY CLAIMS - PART I

The topic presented will review many items involving negotiating techniques that those of us in the surety and fidelity claims arena know by instinct but fail to recognize specifically as we enter into the discharge of the Surety's obligations under its bonds. We will review steps that can be taken to minimize the Surety's loss, cost and expense, while at the same time discharging the Surety's obligations.

The reality of handling claims both surety and fidelity, means that negotiations will occur at different levels. Those involved in this claims handling process may forget that the discharging of the Surety's obligations is not merely determining if there is coverage and paying a determined amount but indeed involves negotiation at many different levels.

There are actually three different levels of negotiations with sub-tiers in each of these levels that the claims handler is confronted with.

### Negotiating With Your Own Organization

The first and most easily understood level of negotiation is within the claims handlers own organization. Most corporations have tiers of authority. The studies done by various groups discuss the success of negotiations by the individuals involved at the different levels of management. The studies concentrated on the power that an individual has in the various tiers of authority in the negotiating process and the success of those individuals negotiating results.

Those corporations which bestow more power on their lower echelon people tend to find more successful negotiated results. This is linked to the aspirations of the individuals doing the negotiations on all levels.

The first step for the claims handler (negotiator) to accomplish is an understanding of their own corporate structure, an understanding of the constraints placed upon and what authority they have.

Individuals with high aspirations will readily recognize corporate political situations, deal internally with them and over a period of time, will ideally gain more authority as their success ratios increase.

#### Negotiating With Obligee and Its Agent

The handling of a surety contract default, in my opinion, is one of the most unique negotiating scenarios that can be encountered. Not only does the surety claim handler have to deal with the Obligee and all of its different representatives but at the same time is negotiating with its own principal and personal indemnitors. A review of the negotiating stance that one takes with the Obligee necessarily demands an analysis of who the surety claims handler is actually dealing with. The Obligees on surety contract bonds vary rather dramatically.

The Obligee can be the United States Government, a Municipality, a private owner, a general contractor, or a sub-contractor. The claims handler needs to determine, as early as possible, who the ultimate decision makers are for the Obligee. All of us who have been involved in this business, have found that we were dealing with those who appear to have authority to make decisions for the Obligee only to find out later that those individuals had no power. These people, however, are a very important part of the discovery process for the Obligee. This type of individual greatly enhances the negotiating ability of the Obligee due to the fact the Surety's representative usually has disclosed, to these individuals, the facts as perceived by the surety claims representative and what that representative feels are the needs of the Surety to discharge its obligations. The feeling of the claims handler when they realize the person they have been dealing with has no authority, is one of disbelief. The negotiating process starts all over again with the surety claims representative having very little left to negotiate with. The Obligee, if they have knowingly engaged in this type of discovery process, would be applauded by those who study the art of negotiations.

The Obligee and its representatives need to be analyzed by the claims handler from the outset. An analysis of the Obligee may reveal multi-tiered decision makers and the claims handler needs to determine who they are and their pecking order as soon as possible. This requires time and effort, not just phone calls, but personal meetings.

In addition to dealing with employees of the Obligee, it is just as important to recognize that the Surety is also, necessarily, negotiating with the architect or engineer of record, constituents where the Obligee is a public body, the attorney for the Obligee and the various tiers of decision makers for the Obligee.

The impact of these other entities can be quite significant. If the architect or engineer realize they have problems due to design or inspection they will become quite active in trying to have the Surety assume liabilities that they are not obligated for. This occurs when those who are not as ethical as we would hope them to be, impose their special interests into the negotiations. This can change the entire complexion of the negotiating process.

The attorney representing the Obligee also represents a challenge in the negotiating process. If the attorney is attempting to presently obtain the business of the Obligee and it is their first case for that client, the surety claims individual may find themselves dealing with a much more inspired advocate. The high aspiration level of an attorney to win and maintain the account may result in substantially higher demands being made on the Surety.

#### Negotiating With Principal and The Indemnitors

The negotiating process is difficult enough when you are dealing with one other party and the possible agents of that party. The surety claims handler, however, is in the unique position of simultaneously dealing with its own principal and the personal indemnitors while negotiating with the Obligee.

The claims handler needs to review the make-up of its own principal and personal indemnitors. It is not uncommon for the surety claims handler to encounter two partners disagreeing who have been partners for a long time. This disagreement may change the entire corporate complexion, which at one time was a successful contractor, into a politically fragmented entity which can no longer successfully operate in the construction field. The surety claims handler finds himself confronted with two adverse partners and personal indemnitors which further complicates the claims handler negotiating process.

Even in those situations where the principal is a united entity, the claims handler may find adverse reaction from the indemnitors. This usually occurs in the situation where the indemnitors are spouses that have no day to day contact with the principal or other outside stockholders. The claims handlers have certainly found themselves in positions where there has been an agreement with principal, but have been receiving threatening letters from the indemnitors if the Surety would take the agreed course of action consented to by a principal.

In addition to negotiating with the principal and the indemnitors, the Surety also needs to be cognizant that they will simultaneously be negotiating with the principal's attorney and/or the indemnitors' attorneys.

#### The Fidelity Negotiating Challenge

On the fidelity claims handling side of matters, the claims handler again finds that the negotiations are on multiple levels. The owner of the fidelity policy typically is broken down into various management and accounting levels. When a defalcation has been discovered, the investigation is typically turned over either to its own accounting department or to an outside consultant.

The politics of the investigation being performed internally raises many interesting scenarios for the claims handler. The very people who should have been able to prevent, or discover early, the defalcation may get creative in their documentation. The claims handler needs to be sure that the documentation that is being presented is applicable to the accused principal and not an opportunity for the preparer of the claim to get rid of other problems that may not be related to the defalcation. This is an element that will reveal itself through meetings, discovery and the negotiating process.

### A Check List to Successful Negotiations With All Parties

The surety and fidelity claims handler will be more successful in protecting its corporate assets and discharging its employer's corporate obligations if they recognize that the Obligee and various entities are all part of the negotiating process.

The following items are a check list to review during the claims process:

1. Discovery - Know the Facts
2. Deadlines - Know your own and those of others
3. Aspiration Level - Know your own and those you are negotiating with
4. Knowledge Needed Before the Negotiations Start
  - a. Bond terms and conditions
  - b. Contract terms and conditions
  - c. Facts (historical)
  - d. Know Who the Decision Makers Are
5. Alternatives available:
  - a. Deadlock Negotiations
  - b. New Deadlines
  - c. Cash vs. Performance Options
  - d. Payment over a Period of Time
  - e. Performance with a Reservations of Rights
  - f. Recognize the Immediate Needs of Principal and Indemnitors

Due to the amount of time, this topic has only been touched upon. The reader is encouraged to take some of the seminars that are being offered in negotiating and to read the numerous books that are available on this subject. The endeavor will hone the claims handler's instincts. The educated claims handler will recognize when the various parties are using negotiating techniques. They will also understand the discovery process, the art of negotiating to deadlock, and will understand why some negotiators always ask for outrageous sums of money in their negotiations. The recognition of the various components of the negotiating art will enable the claims handler to minimize the Surety's lost, cost and expense, while at the same time discharging the Surety's obligations.