Managing to Win

Collaborating on Litigation Objectives

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For as much as lawyers and clients talk about winning their cases, you won't find a definition of "win" in Black's Law Dictionary. There may be winners and losers at the end of a trial, but you can't tell who's who just by looking at the verdict sheet.

What constitutes a win is in the eye of the beholder. In insurance cases, carriers and their counsel may not see eye to eye on the subject. Even when they do agree, their mutual client, the insured, may not be quite as enthused with their claimed victory. To function effectively as a team, carriers, policyholders, and counsel must define their objectives at the start of each case.

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A History Lesson

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— Robert Goodloe Harper, 1798

When France demanded multi-million dollar bribes from the United States, Congressman Harper used these words to express the contempt of a nation besieged by its rival's unwarranted seizure of American ships. Unwilling to meet these demands, hostilities between the two nations continued for two years before American and French diplomats ultimately resolved the conflict on more amicable terms. American defiance produced a favorable settlement.

Over the next 200 years, insurers have echoed these sentiments in response to the inflated demands of plaintiffs. Exclaiming that the "best defense is a good offense," claims managers were more apt to take dubious claims to trial. Understanding the risks, litigation managers would tell their counsel that "if you aren't losing any cases, you aren't trying enough of them."

Times have changed. As their front line soldiers prepare for battle, the generals in home office now question the cost of ammunition. Mr. Harper's descendants may want millions for defense, but defense counsel must answer to claims resolution managers who carefully monitor legal expense. Hawkish exclamations have been replaced by guidelines designed to manage attorney's fees.

Now that "every case has a value," adjusters are more inclined to pay tribute on claims that their predecessors might have denied. As their counsel work toward winning at trial, claims resolution professionals are increasingly evaluated on the speed with which they resolve their cases. Thus, while defense verdicts may be the pinnacle of success for trial lawyers, the celebration may be muted in claims departments that must account for a spike in legal spend.

Accurate or not, carriers think that litigation costs have skyrocketed. This perception adds tension to otherwise congenial relationships among carriers, counsel, and policyholders. Left undefined during the course of battle, each may have different concepts of winning that

correspond with their distinct roles in the process. Unless they can articulate common goals at the start of a case, their differing perspectives may interfere with the teamwork required for effective litigation management.

Differing Perspectives

To reach a meeting of the minds, carriers and their counsel should engage in a reading of the minds. Though their views may differ, all participants in the process have perspectives worthy of consideration when forming a winning strategy.

With sound litigation management, claims resolution professionals may save their companies many times their own salaries.

Defense Counsel – Contrary to the claims of cost-containment experts, defense counsel are not adversaries in the effort to obtain efficient and favorable results. Nor are they greedy mercenaries who thrive on protracted litigation and line their pockets with unnecessary work. In fact, their rates are typically less than half of those charged by lawyers representing other corporations in litigation far more protracted and expensive than the majority of insurance claims.

Insurance defense lawyers strive to protect the system from those who would abuse it. Forgoing the lavish lifestyle of those who litigate on the other side, these attorneys are passionate about trial work and possess the competitive drive needed to win. Unlike litigators who rarely appear in court, these trial lawyers take great pride in bringing defensible cases to trial and in combating the inflated demands of their adversaries.

Considering the leverage provided by daring defenders who frequent the courtroom, carriers seek these traits when retaining counsel. Because they know what it takes to win, these lawyers are particularly adept at tailoring discovery efforts to expose the plaintiffs' flaws. Armed with this information, insurance defense counsel are uniquely qualified to evaluate liability and damages, to ascertain the prospects of dismissals or defense verdicts, and, if appropriate, to negotiate favorable settlements.

Given the resources, defense attorneys may make a big difference in the final outcome. Yet, rather than exercise the patience to achieve better results, some carriers put the brakes on legal fees and pay a premium for fast settlements. Ironically, after spending thousands of dollars above the value of a case, these same carriers cut nickels and dimes off of the defense bill.

Those who are more generous to plaintiffs' counsel than to their own lose the savings that comes through astute litigation strategy. Closing cases quickly can save pennies in the short run, but hasty deals leave many defense lawyers perplexed.

Carriers – Defense lawyers will find many kindred spirits in the claims department of the carriers they represent. Claims departments are frequently seen as a source of red ink rather than as a source of savings. Indeed, one CEO quipped that "underwriting brings money in the front door" while the claims department "let's money go out the back door."

Like their counsel, experienced adjusters can have a major impact on the value of claims. With sound litigation management, claims resolution professionals may save their companies many times their own salaries. But if they want to keep their salaries, adjusters on the front lines must answer to their leadership.

Unlike their adjusters, senior management sets corporate policy on a global scale. Open cases may be assets to outside law firms, but each represents a liability to the insurance company. As one top executive remarked, carriers "are in the claims business — not in the litigation business." Their counsel may thrive on courtroom drama, but carriers do not fund Hollywood productions.

Because litigation is as expensive as it is unpredictable, those in the business of managing risk are understandably concerned about the cost of lengthy proceedings. Accordingly, carriers keep careful statistics on the expense of pending cases and the speed with which they are closed. Thus, while outside counsel may focus on the merits alone, their counterparts in claims must follow directives that go well beyond the facts of a given case.

Policyholders – Where defense costs deplete an insured's coverage, policyholders may share their carrier's interest in limiting them. This is true under many professional liability policies. But when the cost of defense does not reduce the amount of coverage, policyholders may be more concerned with the intangible consequences of litigation.

The ramifications to an insured may long outlive the case itself. A policyholder worried about her reputation may feel

that even a "penny for tribute" would tarnish her image and irreparably harm her business. Conversely, policyholders concerned about ongoing business relationships with other litigants may wish to resolve the dispute more generously and expeditiously. If not, a resounding victory for the insured may seriously jeopardize future business.

Effective litigation plans must consider both the tangible and intangible objectives of the policyholder. Where interests conflict, we must make special arrangements to handle the defense. But even if they do not present legal conflicts of interest, carriers and their counsel should take the policyholder's views into account to form a plan that serves everyone well.

Defining Objectives

Like any effective business plan, winning litigation plans define specific goals that accommodate all interests. Working together, carriers and their counsel may meet the company's global objectives in a plan that is flexible enough to consider the realities of specific claims.

Be Specific – Concerned with the speed and expense of litigation, most carriers have adopted Defense Counsel Guidelines to articulate key objectives:

- "Our goals are cost containment and dispute resolution."
- "We seek to minimize litigation and related expenses."
- "A goal is to discuss settlement opportunities early."
- "Our cases may remain in litigation only as long as needed to achieve successful outcomes."

These are important goals, but they do not replace the need for litigation plans that address the details of specific claims.

To set winning objectives, we must exercise vision. Envisioning the end of the trial, how will the judge instruct the jury? What will the verdict sheet look like? What evidence will you emphasize in closing arguments? Specific answers will identify key issues and provide a road map to victory.

By working backward, the defense team may march forward with strategies tailored to the issues that matter most. Since we don't have millions for defense, we cannot afford to conduct endless discovery. Rather than reflexively depose minor witnesses, smart lawyers focus on the evidence needed to win. With proper planning, they can prepare a detailed budget that conserves resources and promotes a successful and prompt resolution.

Costs and Benefits – Carriers and their counsel must conduct a cost-benefit analysis. Yet, all too often, carriers closely scrutinize the price of litigation while disregarding its benefits. This is a costly mistake. With the increased focus on metrics, carriers tend to overvalue items that can easily be measured and to undervalue those that cannot. If we only measure expenses, carriers will not recognize the inverse correlation between litigation efforts and indemnification costs. We must keep better score.

Litigation comes at a cost, but with proper planning it may also be seen as an investment. By conducting an optimal amount of discovery, the defense may undermine a claimant's case and contribute to a resolution that could save the carrier far more than it spends on counsel.

Efficiency matters. It is not all that matters. Effective litigation management does more than cut costs. In collaboration with counsel, litigation managers must implement strategies to minimize exposure by winning cases outright or by reducing the value of claims.

Those who manage expenses alone may harm their carrier's economic interests on a global scale. Unique cases may set precedents that preclude future claims. In more routine cases, carriers who rush to settle can eliminate legal fees in the short run, but may encourage more claims. Conversely, those who litigate, and settle late, may unwittingly promote protracted litigation from claimants who think that their best deals will come on the courthouse steps.

Be Flexible – Effective litigation plans must specify objectives in relation to the merits of the claim, the overall exposure, and the expense of reaching a favorable outcome. As events unfold, the defense must continually revise projections, reconsider costs, and adjust objectives accordingly.

This plan must not be confused with Defense Counsel Guidelines. Written from a global perspective, general guidelines cannot replace the advice of counsel, or the experience of litigation managers who analyze the case at hand.

Claims resolution professionals and their counsel must collaborate on a winning game plan — one that sets realistic objectives and provides the resources to achieve them. LM

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