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## **Upping the Game - Taking Metrics to the Next Level**

### **I. Survey Results Show Metrics Use is in Place**

Metrics remain of critical importance to claims and litigation leadership, and to law firms as well. A discussion of metrics, their use, effectiveness, and industry satisfaction with them, was a key component of the 2019 CLM Litigation Management Study (“LM Study”) and the 2020 CLM Defense Counsel Study (“2020 Study”).

The 2019 CLM Litigation Management Study surveyed insurance executives on how companies were deploying resources, considering law firm performance and facing new industry challenges. The very first key finding from this study was that overall litigation program importance remains very high. Specifically, 71% of the participating organizations said that the effectiveness of their litigation program had been discussed with their respective CEO and 75% of the respondents said that Litigation Management effectiveness is getting more attention from senior management compared to just three years before.

Suite 200 Solutions published the March 2020 CLM Defense Counsel Study that analyzed metrics from the law firm’s perspective. The 2020 Study focused on the thoughts and observations of defense counsel and the purpose was “to provide information and data that will facilitate improved communication and working relationships between defense attorneys and the litigation executives who hire them.” In the Study, CLM compares the results from the 2019 LM Study to see how insurance companies and law firms view similar issues. Four hundred defense attorneys responded to the survey and of those respondents, 24% were law firm leaders, 82% were partners, and 13% were associates.

In its third annual survey, *Bringing Legal Analytics Into Focus*, Lexis Nexis found that Law firms have realized the importance of legal analytics and more law firms use metrics now more than those law firms that don’t. (<https://www.lexisnexis.com/community/pressroom/b/news/posts/new-lexisnexis-survey-indicates-legal-analytics-adoption-has-reached-tipping-point-among-law-firms> (accessed February 2, 2021).) The results showed that 70% of law firms now use legal analytics, and 75% of responding law firms cited an increase in metric usage at their firms over the last year in 2019. Ninety percent (90%) of responding law firms state that metrics makes them better, and 92% plan to increase metric use over the next year. Most law firms agree that metrics make them better, as 98% of law firms believed that legal analytics improved their efficiency. Additionally, 73% of metric users said “gaining

competitive insights” is important, and that metrics provides a competitive edge in building new business.

## II. Traditional Metrics Are Helpful

The most important metrics currently relied upon by insurance carriers revolve around average costs per file, case cycle time, and total case costs.

### A. Carrier/Client Perspective

#### 1. Cycle time

Cycle time is defined as the amount of time a case is open with a law firm. According to the 2019 LM Study, 80% of carrier respondents said that most litigated cases settle later in the process than necessary.

Law firms and carriers agree that some attorneys are better than other attorneys at closing files. A small percentage (8% of carriers and 13% of attorneys) believe that it is an innate skill and cannot be taught. Claims professionals and executives attribute much more of the file closing success rate to case processing and the application of the file closing process. It is vital for a law firm to adequately describe its process rather than describe only its attorneys without a focus on the process of closing files.

#### 2. Budgeting/Reserves

##### a. Expense

Metrics related to budgeting include **cost per case**, or the expenses associated with a case. Carriers track this in different manners. It can be simply defense costs or it can include expenses, experts, etc.

In the 2019 LM Study, claim executives scored their staff’s ability to evaluate and negotiate budgets at 47 out of 100 (almost twice as high as the attorneys in the 2020 study). In the 2020 Study, when ask to rate interactions on budgets “100” being “deep discussion and negotiation around budgets” and “1” being “claims handler just approves the budget outright”, the median score for all responding law firms was 23. Those in leadership roles within firms had an even lower median score of 20.

Negotiating and evaluating budgets is an area where claim adjusters and attorneys can focus more attention to boost this skill set. Yet, many organizations keep reserves hidden from counsel on individual files. “How often do claim handlers use your litigation budgets to inform their expense reserves?” – Exactly half (50%) said “sometimes” or “often.” 44% stated that they did not know as claim handlers did not discuss their practices with them. For attorneys, budgeting is not an important area when analyzing a particular file and there is room for improvement in this area. Attorneys should take care to effectively analyze and determine budgets to provide better value to the client/carrier.

Other analytics related to expense and budgeting include:

- Timekeeper ratio (staffing) -- the percentage of billable time associated with each class of biller (partner/associate/paralegal)
- Phased billing -- the amount a firm spends on each “L” Code
- Net effective rates -- the overall average hourly rate being paid to a law firm
- Guideline/billing compliance -- tracking how outside firms do with regards to meeting litigation or billing guidelines (number of tasks overdue, percentage of audit cuts).

Of the items listed above, an understanding of timekeeper ratio data and phased billing data is important for law firms to be able to bid alternative fee arrangements (“AFAs”). AFA agreements can be beneficial to carriers and still profitable to law firms. It is also important to track write off rates, which are easily tracked with electronic billing platforms. Most law firms track this data. Monitoring the data on a regular basis can facilitate efforts at reduction of write offs, which can include working with assigned teams to reduce write offs.

#### **b. Indemnity**

Another metric typically employed is **indemnity per case**, or the amount paid to the adverse party/claimant. This metric can be used to determine where a particular case falls within a group and to determine variances from the norm based on various data points.

#### **B. Law Firm Perspective**

The top three metrics cited by firms responding to the 2020 Study included cycle time, billing efficiency and process and reporting compliance. The responding firms also confirmed the belief that the metrics they capture are somewhat aligned with the metrics their clients capture. Roughly half of attorneys feel that the metrics provided by their clients to them is pretty insightful and they value it.

### **III. New Metrics Can Improve the Claims Management Process**

The 2019 LM Study identified multiple areas of non-financial metrics that carriers are maintaining, or beginning to capture, about law firm performance. These include: communication and responsiveness, timeliness of reporting, number of trials and trial results, adherence to strategic case plans, closing ratios, mediation and ADR results, and file tempo (among others). Reporting expert costs separately can be useful in tracking expert costs by claim type. In addition to using metrics to track budgeted vs. actual expenses, metrics can be useful in monitoring the burn rate on budgeted fees and expenses.

Additionally, carriers and law firms can use metrics to track risk transfer efforts. Data points include, but are not limited to, the availability of risk transfer, timing of risk transfer efforts, parties and case types to which the process applies, the type of risk transfer (contractual, additional insured, third-party claims) and the results (contribution to defense, reduction of defense costs, and contribution to indemnity expense).

In Florida, risk transfer in the context of tendering as an additional insured in cases involving multiple parties has been met with resistance, as Florida law prohibited contribution actions between carriers. Historically, all states but Florida and Minnesota historically allowed for contribution actions

between carriers whose policies provided coverage for the same loss. Florida joined the majority with the passage of HB 301, which added Section 624.1055 to Florida's Insurance Code, in July 2019. The statute provides that a "liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action, provided that contribution may not be sought . . . for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action." The statute applies to any "claim, suit or other action" initiated on or after January 1, 2020. The statute allows for defense costs to be allocated by the court "in accordance with the terms of the liability policies," and to apply "equitable factors" as deemed appropriate in making the allocation. Tracking of data on risk transfer efforts prior to a contribution action, as well as including metrics on the results of contribution actions, can be helpful in assessing both defense and indemnity reserves.

Another area that is subject to metrics is outside counsel's use of joint defense agreements, when appropriate, to reduce legal expense. These agreements, and materials and information exchanged pursuant to such agreements, are protected as attorney-client privileged and work product under the joint defense privilege or common interest doctrine under most circumstances. *See, e.g., In re LTV Securities Litigation*, 89 F.R.D. 595, 603-04 (N.D. Tex. 1981) (discussing joint defense privilege (citations omitted)); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980) (same); *Selby v. O'Dea*, 90 N.E.3d 1144, 1149-66 (Ill. Ct. App. 2017) (discussing common interest exception to waiver of attorney-client and work-product privileges when there is a common interest agreement between parties and/or their attorneys, citing to multiple jurisdictions). The information is protected even when the parties' interests may be adverse to each other, but they are aligned on an issue or one side of the case. *Id.*; *see also U.S. v. McPartlin*, 595 F.2d 1321, 1335 (7<sup>th</sup> Cir. 1979) (finding that statements made to co-defendant's investigator were privileged); *Shenwick v. Twitter, Inc.*, 2019 WL 3815717 (N.D. Cal. 2019) (recognizing common interest doctrine, applying to conversations of nonparty and counsel and counsel for defendant in preparation for nonparty's deposition); *and see Biovail Laboratories, Int'l v. Watson Pharmaceuticals, Inc.*, 2010 WL 3447187 (S.D. Fla. 2010) (denying motion to compel production of joint defense agreement containing boilerplate terms protecting exchange of privileged information on the grounds the agreement was not relevant to claims or defenses for discovery purposes).

Indemnity paid by adverse counsel is another area that can be used to evaluate settlement possibility with adverse counsel. Businesses and insurers want panel firms to track first demand, last demand and indemnity paid for adversary counsel and report it for any line of business.

#### **IV. Practice Tips and Thoughts for the Future**

Both the 2019 LM Study and the 2020 Study indicated an inconsistency among respondents on how data is utilized in terms of sharing between the carrier and outside counsel. The lack of sharing of data can prove to be a frustration for outside firms. Most law firms understand, consistent with the results of the 2019 Litigation Management Study, that metrics and analytics are being used in some fashion to grade performance. Though there are Key Performance Indicators for each individual carrier, sometimes that information is not shared. At the same time, law firms could be taking a more proactive

stance on keeping some of their own data and metrics. Carriers can become frustrated when outside counsel does not seem to show alignment with their initiatives.

From the Panel's perspective, the sharing of this information is something that can be improved both by the industry and its outside counsel partners. We know of many insurance carriers who have open dialogue about the key metrics and analytics which are important to them and how that particular firm is measuring up to expectations. Some carriers are reluctant to share this information. This could be attributed, in part, to the fact that metrics and analytics are an ongoing science and some question the validity of their data.

In the 2020 CLM Study, responding attorneys scored 38/100 on whether they actually ask clients for performance data. An overwhelming 96% of attorneys said that law firms don't ask for client data enough. Over 50% of law firms are skeptical whether clients will share their own metrics with them if law firms asked. Thus, there needs to be more openness between the firms and buyers to increase efficiency and accept the new wave of metrics.

Law firms do hold a strong belief that their metrics are aligned closely with the metrics of their clients. Yet, the 2019 Study revealed that 96% of legal service buyers say that law firms do not ask for client created performance data enough. Law firms should ask their clients for more data. Comparing the data sets of law firms to those of buyers is an efficient idea for both parties.

While metrics and analytics have become an important part of our industry, most feel that the information is still being underutilized. Using the information to help shape case outcomes is one of those areas where the industry could do better. Many carriers are utilizing metrics to help determine case outcomes. In its simplest form, carriers may utilize average fees per case or average indemnity per case on a particular line of business or in a particular jurisdiction to help set reserves or settlement authority. That data may be used to help make the last offer before a case is sent to outside counsel. Metrics and analytics are also being utilized by carriers to help shape fee arrangements. Carriers or firms that can work together on shaping a mutually beneficial alternative fee arrangement provide the carrier with a better opportunity to be more aggressive on indemnity without having the worry of expense.

The use of metrics and analytics, and ultimately predictive modeling (a topic for another day) will become of great prominence in the 2020s. Current outside sources of analytics include Westlaw Edge. Additionally, Lexis Nexis's Lex Machina company has created a Legal Analytics Platform has a Timing Analytics feature that uses AI to predict an estimated time when a case goes to trial before a specific judge. (<https://lexmachina.com/legal-analytics/>, accessed February 3, 2021). Lex Machina's Party Group Editor allows buyers to select lawyers and analyze their experience before a judge or court and the number of lawsuits that the lawyer has been involved in before the one the buyer seeks retention.

Some law firms used Legal Analytics to determine who is the plaintiff, who is their counsel, who have they represented, and who else have they sued. (<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>, accessed February 3, 2021). Additionally, the same software can be

used to find out if judge's history of ruling in cases favors the plaintiff or defendant. This sole data point could be the difference in deciding whether to try the case or settle.

Premonition, claimed to be the world's largest litigation database, asserts to have invented the concept of predicting a lawyer's success by analyzing his or her win rate, case duration and type, and his/her pairing with a judge at an accuracy of 30.7 percent average case outcome. (<https://premonition.ai/lawyer-win-rates-arrive-canada/>, accessed February 3, 2021).

The data that most carriers have allow them, if they take the time, to analyze firms who routinely manage certain phases of litigation better, measure firms that are successful on their budgeting and costs, and measure "success" in moving the case forward according to plan. This takes the use of metrics above and beyond just looking at cycle time and budgets. In short, the future of using data and metrics to help manage expense and case outcome is bright.