



CLM 2020 Annual Conference
March 18 – 20, 2020
Grapevine, TX

Panel Counsel Checklist — A Guide to Quality Work and Navigating Ethical Quandaries

I. Set the Goal

A. Two Clients May Have Two Different Goals

Define Victory

Generally, clients want victory, however defined, at minimal cost. Victory, however, can only be defined by the client (or clients). Sometimes even achieving the business objectives of litigation, is a failure when but did not meet the expectations of their clients or a superior within the claim's organization, they fail and not succeed. In other words, the case was not a "win". Gray Reed & McGraw, *Defining a Win*, September 3, 2019.

Unless you determine how the clients define a win, you cannot create a plan for litigation success. Success may be achieved but a loss is still perceived because you failed to understand the clients' expectations - for instance, the cost of the result, the timing of the result, the means by which the result was won – all could have been outside of the expectation of the clients. Perhaps the insured or carrier may have expected an outcome that was impossible to obtain, but because of a failure to communicate those impossible expectations were maintained and thus any other result is considered a failure.

Understand the Objectives

Understanding the objectives, agreeing on the plan to obtain those objectives, effective and consistent communication throughout the entire litigation process is necessary to achieve a success. Because you have more than one client to report to, it is imperative that you determine the goals of each and attempt reconciliation where possible.

Follow the Rules of Professional Conduct

While the above are best practices, the Rules of Professional Conduct also require these actions.

ABA Rule 1.4 - Client-Lawyer Relationship

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The above Rules demand that attorney's communication with the client concerning client objectives from the outset of the representation. Attorneys are required not only to listen to their clients, but also to understand in terms of quantifiable and unquantifiable results, what the client desires for an outcome. Laver, Seth L., Luongo, Michael, *Who's the Boss: Attorney or Client?* October 31, 2013.

B. Resolving the Conflict

In many jurisdictions, defense counsel, the carrier and the insured are in what is considered a "tripartite" relationship. The translation of which is that the insured and the carrier are both the "client" of the defense counsel. Fields Howell LLP, *A Delicate Balance: Successful Navigation of the Tripartite Relationship*, May 23, 2019.

Some states follow the rule that only the insured is the client – this is considered the "one-client" rule. The concept behind the "one-client" rule is that both the insured and the carrier cannot reasonably be the client without weakening " the relationship between the insured and defense counsel" because of the competing interest of the carrier. Fleming Powers, Jean, *Advantages of the One-Client Model in Insurance Defense*, New Mexico Law Review, Fall 2014.

Ethical Considerations when Clients Don't Agree

Defense counsel owes the insured a duty of undivided loyalty in all cases. Most of the time this does cause a problem because the carrier's interests are aligned and consistent with the insured. The duty of undivided loyalty requires defense counsel to take no action that injures the insured's interests without the informed consent of the insured. Examples of such conduct

could be helping the carrier defeat coverage, settling a case over the insured's objection, and defending a claim by eroding coverage.

If representing both the insured and carrier would create a conflict of interest, then joint representation is impermissible, unless defense counsel obtains informed written consent from both. If written consent is not obtainable, then the carrier must secure independent counsel representing only its interests to honor its obligations to defend the suit. Advisory Committee on Special Ethics, appointed by the New Jersey Supreme Court, *Conflict of Interest Representation of Insurance Carrier and Insured where Question of Coverage is in Issue*, Opinion 502, 110 N.J.L.J. 349, September 23, 1982.

Taking the Right Path

Defense counsel show engage vigilance in identifying possible conflicts of interests between the insurer and the carrier. Defense counsel is required to maintain the confidences of the insured. ABA Model Rule 1.6. But the practice is that defense counsel reports to the carrier through some form of formal reporting the case ongoing including the information obtained from the insured. The basis of this disclosure is the insured's implied consent in the insurance policy which gives the carrier the right to control the litigation. But the practice is not without pitfalls because in some instances, disclosure may result in a conflict of interest.

For instance, defense counsel must obtain the policyholder's consent to disclose to the carrier any materially adverse information. Materially adverse information would be information that would limit or preclude coverage. The consent required is "informed consent." Which means defense counsel must provide the insured with information concerning the material risks of disclosure which must be explained and discussed with the insured along with the reasonably available alternatives to disclosure. If the insured's consent cannot be obtained, a conflict exists. ABA Model Rule 1.6.

II. Set Strategy to Paper

A. Defense Strategy

Strategy is the process of designing and achieving a desired outcome. Google: *Define Strategy*. A litigation strategy organizes the defense to a cohesive focus. Advanced strategies anticipate and even form events, helping to guide the case or issue to the desired outcome. Wikipedia, *Litigation Strategy*. "Litigation strategies are either primarily direct or primarily indirect, though they usually include elements of both." Wikipedia, *Litigation Strategies*, citing, *In the Art of War*. For example, in *In the Art of War*, Sun Tzu observes: 'In battle, there are not more than two methods of attack – the direct and the indirect; yet these two in combination give rise to an endless series of maneuvers.' Giles trans p. 41.

Litigation strategy is how counsel intends on achieving the goals of the litigation. Dreier, A.S., *Strategy, Planning & Litigating to Win*. 2012.

Developing a Case Management Plan

A case management plan is a written case plan outlining the goals, the plan to achieve them and the cost. The plan is reviewed and agreed to by all the involved parties and it is updated and modified as necessary to ensure compliance and inclusion of case developments.

A core outline for a case management plan is as follows and is in part derived from that developed by Theodore Becker, published by Find Law, *Effective Case Management: How to Control Litigation Outcomes and Costs*.

The Written Plan:

I. Attorney-Client Understanding: Determining Outcome Objectives and Cost Objectives

Set down the clients' desired outcomes and the costs. Outcomes cannot be determined without consideration of costs. If cost objectives are set at the outset of a case, the risk of failure is greater.

II. Insurance Coverage: An Essential but Frequently Overlooked Assessment

Even if the carrier retained counsel for the insured, counsel should verify that the matter, is covered under the terms of the applicable policy or policies and the extent of the coverages. Counsel should also inquire with the insured of other possibly applicable coverages and ensure a tender is made to any and all other carriers.

The insurance assessment should be done within the first 30 days of the retention of counsel.

III. The Preliminary Case Assessment and Litigation Plan: A Roadmap

The litigation planning process should start upon assignment. The Case Management Plan sets the course by the clients' goals can be achieved. A Case Management Plan general includes:

1. Interviewing and preparing an assessment of the fact witnesses;
2. Obtain, review and prepare a written analysis of the insured's documents and other available evidence in the matter;
3. Prepare a written overview of the facts known to the insured;
4. Prepare a written analysis of the applicable law against the facts known; and
5. Identify possible areas of expertise for expert witnesses that might be required.

IV. The Initial Settlement Attempt: Achieving Outcome Objectives and Cost Objectives Through Negotiation

Counsel should attempt to resolve the matter at the earliest opportunity, unless the insured is opposed and directs otherwise. Counsel should from the earliest juncture suggest ways in

which a resolution can be achieved or attempted to increase the likelihood of achieving the insured's goals and cost objectives.

V. Dispute Resolution: Achieving Outcome Objectives and Cost Objectives Through Alternatives to Litigation

Counsel should consider and advise the insured and carrier on recommended alternatives to litigation, such as arbitration and mediation.

VI. The Staffing and Workflow Plan: Achieving Outcome Objectives and Cost Objectives Through Resource Allocation and Technology

Assigned staff should be identified for the carrier and the insured, including the primarily responsible attorney, associate attorneys, and other staff working on the matter. These identifications should include where appropriate the assignments or aspects of the case which may be handled by that staff. In addition, the Case Management Plan should include recommendations for the use of consulting experts on specific aspects of the case, as well as litigation support services for court reporting, document management, text search and retrieval, demonstrative evidence, investigation, pre-trial jury research, etc.

Becker, *Effective Case Management: How to Control Litigation Outcomes and Costs*.

Decision Tree Analysis

Evaluating the possibilities/probabilities of outcomes in litigation is known as Decision Tree Analysis. Nortini, J., *Effective Alternatives Analysis in Mediation: "BATNA/WATNA" Analysis Demystified*, January 2005.

A decision tree charts the most important and uncertain ultimate issues and influencing factors if the case is litigated. Ultimate issues are considered outcomes which would be determinative of the case respecting liability and damages. Influencing factors are those uncertainties aspects of the case that will influence the outcome of the ultimate issues (e.g., admissibility of evidence, third-party witness testimony).

On a Decision Tree, a decision node is generally represented by a square and identifies a strategy choice that is totally within control of the litigation team. Possible strategic options would be illustrated on the branches, horizontal lines, that follow the decision node.

Possible decision nodes and branches include:

- Continue to Litigate
- Agree to Settle at \$X
- File Counterclaim
- Do Not File Counterclaim

A chance node, generally a circle, represents an uncertainty. The branches that follow show the possible ways in which the uncertainty might resolve. The uncertainty must be capable of

resolution in at least one of the ways shown on the branches, in no more than one of the ways shown, and in no additional ways beyond those already shown.

A scenario constitutes a combination of branches read from left to right. Probabilities represent counsel's best estimation of the likelihood of the possible outcomes at each branch. Probabilities at a chance node must sum to 1.00 (100%). There are no probabilities under the branches following a decision node, because there you select the strategy that is best.

The soundness of the Decision Tree should be analyzed before making any decisions on the nodes. Everyone involved should know that the Decision Tree is scientific, precise, or objective. It is merely an attorney's best subjective opinions of the major uncertainties in a case, their interrelationships and consequences, and their probabilities of occurring.

Consensus of the team should be obtained on the completeness of the Decision Tree before reviewing the probabilities. The percentages and verdict ranges should be further reviewed against the data that supports counsel's judgment on both sides of the issue. Evaluate all evidence and witnesses (unfavorable as well as favorable) (harmful as well as helpful). The team should consider the general factors, such as a jury bias against insurance carriers or corporations, among other in making decisions.

There are two ways of evaluating a Decision Tree:

1. Determine the compound probability of each scenario and then to plot the various damage awards and their respective probabilities in a graph. To do so, you multiply the probabilities that exist under the branches comprising that scenario. The logic behind multiplying probabilities together is to ensure that each is given the appropriate weight and that the conclusion fits counsels carefully arrived at opinions on each of the many underlying issues best.

2. Calculate the expected value. This is a probability-weighted average value (or mean value). It is arrived at by weighting each of the possible outcomes by its probability of occurring. Victor, M. *Interpreting a Decision Tree Analysis of a Lawsuit*, 2001.

B. Value Drivers for Settlement/Jury Value

It is generally accepted that cases should be settled for a fair value, but there is no uniformly accepted theory of how to set that value. Magana, *Evaluation and Settlement of Personal Injury Claims*, 441 INS. L. J. 639 (Oct. 1959).

In practice, establishing a case value includes evaluating multiple case components in some formulaic way, ranging from basic to sophisticated formulas. However, most valuations often consist of counsel's experience in handling prior cases to arrive at a settlement value figure.

Here we analyze some of the various ways in which case value is obtained. Some are quite simple – for instance, the long-standing concept that a settlement value of a personal injury case is equal to six times the special damages in the case. Other methods are more complex. For instance, H. Baer & A. Broader, *How to Prepare and Negotiate Cases for Settlement*. (1967).

Also, JVR Case Evaluation Software for the Evaluation of Personal Injury Case, Jury Verdict Research, Inc., Solon, Ohio (1990 and subsequent years), has an analytic program for establishing case value.

Most counsel employ a four-step formula to arrive at a “magic number” where the client should be indifferent between settlement and trial - otherwise known as the break-even point. The four-steps are: 1) determining the distribution of verdicts in similar claims; 2) adjusting the distribution of verdicts in similar claims to reflect the unique facts of the particular claim; 3) adjusting the revised distribution to reflect transaction costs; and 4) selecting a settlement value reflecting the client's preferences and values. The schema has one important limitation: it does not relate to integrative bargaining situations. Instead, it is confined to what is known as share or distributive bargaining, where one party's gain is the other party's loss. D. Gifford, *Legal Negotiation: Theory and Applications*. (1989).

Where there is an objective measure of damages, estimating the likely verdict amount is a comparison of the monetary damages against the likely outcome. But, when the measure of damages is subjective as in personal injury cases, a good analysis can begin with the jury instructions concerning pain and suffering. This instruction is typically provided to a jury with almost no guidance in how to calculate a plaintiff's damages.

For instance:

GENERAL INSTRUCTIONS ON DAMAGES-PERSONAL INJURY

If you return a verdict for the plaintiff, then you must decide how much money will fairly compensate the plaintiff for his injury.

I am about to give you a list of the things you may consider in making this decision. From this list, you must only consider those things you decide were proximately caused by defendant's negligence:

The physical pain and mental suffering the plaintiff have experienced.

Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio ST. LJ. 158, 159-64 (1958).

Counsel often turns to other verdicts in similarly matched cases to estimate what a jury in this case may do. The more similarity in facts, the greater likelihood that the predictive value is accurate. Other important factors (besides factual similarity) are:

- 1) Jurisdiction
- 2) How many verdicts on similar fact?
- 3) When were the cases decided?

4) Are the damages similar?

Hoffman, P.T., *Valuation of Cases for Settlement: Theory and Practice*, *Journal of Dispute Resolution*, Issue I, Volume 1991.

Decision Tree Analysis can also be a great predictor of settlement value. A Decision Tree graphically illustrates and employs a probability theory, and a probability theory itself is basically mathematics. As such, a Decision Tree works as well as the inputs that it employs. Like any tool, probability theory and decision analysis are only of value if properly used. Therefore, it is critically important to test the basis of the Decision Tree prior to calculating its probability predictions.

Done correctly, Decision Tree Analysis is a tool offering a great value and helps answer the questions framed in them. In the hands of a decision analyst who understands the issues and constructs the analysis appropriately, a Decision Tree can provide insight and value to counsel looking to determine settlement values. Henthorn, Brian, *How to Use Risk Analysis to Calculate Settlement Value*, Law360, New York (February 19, 2014, 12:35 PM EST)

process.

III. Administrative Management

A. Budgeting

A legal budget:

- Demonstrates the advantages of changing strategies or settling a case by listing the costs out in detail for each;
- Allows clients to more effectively budget for the litigation; and
- Forces counsel and insured to identify the issues that will determine the outcome or settlement value of the claim.
-

Abrams, D.L., *Legal Budgets: A Key to Effective Management of Performance and Fees*.

Look to the Case Management Plan

To capture the right data points, budgets should be dependent on the phases, tasks, and timekeeper effort required to complete the legal work identified. Those items should be contained in the Case Management Plan crafted at the start of the litigation. The budget should track that plan.

Use Data/Adopt Analytics

Tracking that data that is incorporated into a budget permits counsel to modify the budget's initial assumptions and monetary estimates. Over time, these data points help counsel better

predict the accuracy of their budgets. <https://www.counselink.com/budgeting-and-forecasting-whitepaper>

Technology has evolved to track the budget data points which can help the predictability of budgets.

B. Billing

It can be argued that one of the most important pieces of paper that a lawyer sends to his client is the bill. Good billing is much more than a document to help get paid. The bill should tell a story for the client on what is happening with their matter and how the attorney is providing value.

Traits of a Good Biller

Good time entry narratives communicate the value of the time spent in words that the client will understand and appreciate. The client's interest is in what work is being done to effectuate the client's goals. By crafting a good description of the work done and the effort and value given, the amount of the bill becomes less the focus than the quality of the work.

Good Billing entries care:

1. Clear and understandable;
2. Focus on the verbs – are dynamic and display intellectual labor;
3. Show progress (what was done in furtherance of the goal);
4. Demonstrate work that the client is not being charge for; and
5. Are submitted close in time to when the work is performed