CLM Claims & Litigation Management Alliance™
ADVANCING ETHICS, COOPERATION AND EDUCATION

CLM 2016 Atlanta Conference
May 19-20, 2016 in Atlanta, GA

ARTICULATING VALUE AND DISTINGUISHING YOURSELF FROM THE COMPETITION

"Winning the case isn't the 'business.'
The 'business' is the person who gives you the case."

Judging from what's on their websites ("*in this to win"…"proven winners"…"reputations built on winning")* many defense firms might quarrel with the notion that "winning" the case isn't their business. And they would be right to quarrel insofar as handling a case well and being a strong advocate for clients are essential components of any law practice. However, in their quarreling they miss the core truth that the *business* of insurance defense has more to do with understanding the values and the goals of the person or company that send over the cases than obtaining defense verdicts at trial. This disconnect is one reason firms continue to struggle with how to articulate their value to the insurance carriers that send them their cases.

This program will focus on the age old problem of defense firms continuing to struggle with how to articulate their value to potential sources of business (i.e. insurance carriers) and how they can articulate, more clearly, the ways they are different from the hundreds of other firms out there vying for that same business. Through information contained in recent Litigation Management surveys conducted by CLM, and through dozens of collective conversations between the members of this panel and insurance executives, this program with explore what carriers and claims directors are most interested in hearing when talking to defense firms, and some things defense firms might say to a potential carrier/client to capture their attention.

The Current Landscape

This past March (2015), CLM Advisors issued their 2015 *CLM Litigation Management Study General Report* ("CLM General Report"). It was compiled from information obtained from chief claims and litigation officers of approximately 80 different carriers. The carriers who participated in the survey represented a cross section of the industry. Since the bulk of insurance defense assignments comes from carriers who spend less than $45 million a year on legal expenditures, that population constituted the majority of the companies surveyed. However, the survey also included companies with annual legal spend of between $45 and $75 million a year as well as companies who spent more than $75 million a year. (CLM General Report, p. 12) The bottom line is that the survey seems to be an accurate picture of the current insurance industry and the industry's attitudes about defense counsel and litigation management.

The survey made a number of key findings and is well worth reading in its entirety. However, for purposes of this program, some of the more interesting findings were:

- *Insurance carriers are increasing their reliance on performance metrics in selecting and retaining panel counsel (p. 24)*
- *Generally, insurance carriers do not equate higher defense fees with better outcomes. Similarly, they do not believe they obtain better results from firms with higher hourly rates (p.23)*
- *Carriers continue to have a general concern over increased legal spend and increased defense costs (p. 10)*
- *The landscape for law firms is much, much more competitive than it was five year ago (p. 22)*

Given the current environment of heightened competition, increased reliance on performance measurement and the perception that higher fees do not achieve better results, it is more important than ever for law firms to find ways to articulate their value and their effectiveness. However, in the eyes of the insurance industry, defense firms continue to fail to do this well (p.26). When the 80 or so claims directors and insurance executives were asked to rank law firms' ability to articulate their value effectively (in a way that would distinguish them from their competitors) the carriers gave firms a score of only 3 out of 10. Hardly a passing grade.

The conclusions expressed in the CLM General Report are nothing new. For years panel presentations at various conferences and seminars have focused on this issue, and marketing directors at law firms have struggled with the question of how to best articulate a firm's value to a potential client or carrier. It is interesting that a profession that excels at highly effective communication and effective advocacy, continues to struggle with how to be a good advocate and effective communicator for themselves. There are a number of possible reasons for this. The biggest being that there is no single, formulaic response to the question of how the best articulate value. Different carriers have different visions, different cultures and different goals. Similarly, law firms have their own unique visions, cultures and goals. The insured client the firm is being asked to represent has its own vision and desired outcome. There is no one-size-fits-all formula for achieving "value" in that context. Thus, it's hard for firms to provide an easily digestible sound bite as to how they provide value to carriers and differentiate themselves from other firms. However, firms can recognize the need for (and articulate their ability to develop) litigation strategies that are aligned with the values, goals, objectives and desired outcomes of both the carrier and the insured client. That's where the conversations have to begin.

What Do Insurance Carriers Most Want to Hear from Defense Counsel?

The answer to the question of how to best articulate value is as varied as the number of firms and carriers who ask it. There is no formula. There is no single answer. There is, however, a process that can lead each firm to find its own unique way to answer this question. From some of the previous CLM surveys of insurance carriers and from the dozens of conversations that these panel members have had with various carriers, claims directors and litigation managers over the years, there are several common themes that emerge when carriers are asked what can an attorney or firm say or do to get their attention. Below is a brief discussion of 5 of the more common themes:

1. *Our firm has developed its own internal measure of performance. We track those measures and share results with our clients.*

So much of what a firm does in the representation of an insured client is quantifiable. If it is quantifiable, then it can be measured. If it can be measured it can be compared. So a firm's own effort to identify its measures of performance (and tracking that performance) is an immediate way to differentiate their value from other firms. In their General Report the CLM advisors concluded that "We have believed for some time that law firms vastly underestimate their opportunity to participate in, and in fact to help lead, the conversation about performance and metrics. Provided that firms are speaking about performance indicators that matter to a claims or litigation program, we believe firms have an opportunity to contribute heavily in this area." (p. 29).

There are a number of performance indicators which carriers wish to receive from their defense firms which can be obtained through the firm's own internal mechanism of measuring its performance indicators. These include:

- Average life cycle of different types of cases
- Final disposition amount vs. counsel's initial evaluation
- Division of labor on cases
- Average number of timekeepers per matter
- Average age of open files
- Average age of closed files
- Average legal expenses per case by type

Once counsel identifies these metrics and begins to capture information related to them, the next crucial step in the process is to sit down with the current or potential carrier and present these metrics.

What if a firm discovers, through this process, that its performance in one or more areas is lacking? All the more reason to begin to measure the performance. If there is an area that needs improvement, this process will identify it. Where improvement is needed, honesty about those areas and specific measures to improve are much more valuable to a carrier than a firm that doesn't care enough to measure its performance in the first place. Furthermore, as discussed below, carriers attempt to capture a lot of this information on their end. Most carriers assemble their own data base of performance measures. Therefore, it is vital that firms undertake their own process of evaluation of performance measures and share it with a carrier so both can obtain a more accurate picture of how a firm is doing in relationship to what is being looked for by the carrier.

2. *We want to know about the carrier's organization and understand your values, goals, and objectives.*

Carriers are looking for defense counsel who are willing to invest the time and resources necessary to understand the culture, value and mission of the carrier's operation. Once that is done, carriers want defense counsel that are willing to develop defense strategies that align with those values and goals (while simultaneously aligning with the goals and desires of the insured client).

What is the goal of the carrier and what type of service is necessary to meet that goal? If the insurance carrier has a corporate culture focused on preserving its insured's business, that carrier is not going to be too happy with a firm whose scorched earth approach to litigation destroys the relationship

between the policyholder client and the plaintiff (who is the client's primary source of business). By the same token, an insured client might desire a scorched earth approach to litigation because the plaintiff is a competitor of the client and the client seeks to drive the plaintiff out of business. The carrier, however, might not have the same interest in spending its money to accomplish the insured's business goals. These are the kinds of questions to which any good defense counsel needs to always ask. Who are the primary stakeholders here and what do they desire? How can a defense strategy be developed that will align with the goals and objectives of both the carrier and its insured?

Once there is some understanding of the shared goals and objectives, then the carrier and defense counsel can discuss what performance indicators exist to support those goals and how are they measured. Conversely, asking a carrier what it considers to be key performance indicators is an excellent way to learn something about what that carrier desires and values when it comes to the representation of the insured.

Many carriers today utilize performance indicators to measure a lawyer or law firm performance. One common method is to create a firm scorecard that is used to subjectively grade each litigation file once it is over. In those states where the carrier has sufficient litigation to justify primary and secondary counsel, the carrier can pool the data on the scorecards by attorney or law firm to get a bigger picture of a particular lawyer or firm's subjective performance. This information can then be combined with the more objective data available through the carrier's analytics department (average legal spend for certain kinds of cases, compliance with billing and litigation protocols, etc.). This information can then be used by carriers who desire to narrow down their roster of panel counsel firms in states where they have significant litigation.

Interestingly, most carriers are willing to share these metrics with defense counsel. Some of the more forward thinking carriers will hold semi-annual meetings with defense counsel where this kind of information is shared, and where the carriers similarly invite counsel to share their own subjective analysis of how the carrier has done in helping support the development and execution of an appropriate defense strategy. Other carriers might not offer that information in semi-annual meetings, but are nevertheless willing to share it if it's asked for.

The point for defense firms is to ask for the information. Some defense firms may be afraid to do so, because they are afraid of what the results may show. However, if carriers are going to the trouble of establishing performance indicators and accumulating data in the form of metrics that measure that performance, refusal to ask for that kind of information might signal a lack of interest, or even worse—that the firm takes the carrier's work for granted.(CLM General Report, p.27)

3. We develop and implement creative approaches in handling litigation.

Many firms take the same basic approach to insurance defense litigation, regardless of size of complexity of the case. Prepare and file responsive pleadings. Conduct written discovery. After written discovery is exchanged and reviewed, schedule and take depositions. File dispositive motions. Conduct hearings on dispositive motions. Conduct additional discovery. Mediate. If not settled, then try the case to verdict and perfect record for any possible appeal.

While methodical approaches to handling litigation have their place, in an environment where carriers are paying close attention to the cycle time of cases, carriers are looking for creative approaches, aimed at resolving cases more quickly. For example, in the arena of construction defect litigation—when a firm is hired to represent a subcontractor or supplier who might be a very minor player in the case, can defense counsel develop tactics and strategy that will enable early resolution? In a personal injury case, is there pointed discovery that can quickly eliminate the largest element of plaintiff's damages, so as to be able to make the case easier to settle more quickly? Those are the kinds of approaches (as opposed to the traditional slogging through discovery and preparing for trial) that are being looked for by carriers.

4. We are known in the industry as highly competent counsel and authorities in our litigation specialty.

In spite the effort to objectively measure attorney performance through tracking the life span of cases and accuracy of litigation budgets, the defense of an insured is frequently a nuanced and complicated process. There are many aspects of a firm's ability to conduct that defense that cannot be accurately conveyed to a potential carrier client through merely sharing internal performance metrics. The evaluation of defense counsel's work by another client or insurance colleague, and a recommendation from that client or colleague, goes a long way in garnering the attention of a potential carrier client.

Networking and involvement in industry organizations like CLM are excellent ways to procure these kinds of references. Social media—particularly LinkedIn—can also exponentially increase an attorney or firm's exposure to carriers. Additionally, blogging, speaking and publishing articles are excellent ways for attorneys to showcase their knowledge of certain areas of the law and their legal competence. In a world where carriers are hyper-connected with each other, an effort to network, maintain and cultivate relationships is more important than ever.

5. We are willing to try the cases that need to be tried.

In spite of the fact that well over 97% of all cases settle prior to trial (and as important as it is to comply with litigation handling guidelines), carriers still seek attorneys and firms that pose a credible trial threat. The only way to ensure that cases can be settled reasonably is to demonstrate both a willingness (and ability) to try cases, regardless of how difficult those cases may be.

For that reason, it is necessary for carriers to understand their firms' trial expertise, their reputation, the firm's relationship with local trial judges and how well the firm is respected in a particular venue. Firms can convey this kind of information in a multitude of ways. At the very least, firms can keep track of the number of cases they have tried to verdict and the number of cases that they have successfully disposed of via motion.

It's also important for firms to be willing to talk about not only their wins, but also their losses. Anyone with any meaningful experience in the world of litigation (and litigation management) know that lawyers and carriers learn much more from the cases they have lost than from those they have won. A lawyer or firm who has never lost a case, is a lawyer or firm with very little experience. It's the attorneys and firms who have lost cases and learned from those loses (and who refuse to be defined by those

losses) who won't run away from trying difficult cases. Those are the attorneys who will provide the most credible trial threat.

Conclusion

In summary, carriers are looking for attorneys and firms who understand that the primary mission of the attorney is to provide excellent service, not to just win cases. Success is not just a case tried to conclusion with a favorable jury verdict. Success is achieving the desired and agreed upon outcome of the primary stakeholders (the carrier and the policyholder). What that service and what those outcomes will look like will look different depending on the carrier and depending on the insured client. However, it's the willingness of counsel to understand what's being looked for, and a willingness to measure their ability to achieve those outcomes, that can make all the difference.