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What a Rep wants and what a Rep needs...

Preface: The “Company” is used generically to refer to a liability insurance carrier. No one carrier’s information or policies is expressly referenced in this article. Instead, the Company is an amalgam based on our collective century plus years of experience in the industry. The point of this article is to help counsel understand where claims is coming from and to provide some inside baseball information on how to do a better job. A file well-handled and a happy claims professional will likely result in stronger and more meaningful working relationships and favorable results for insureds/clients.

I. The Organizational Flow

The critical importance of timely and accurate communication is predicated on compliance with the litigation guidelines established by the Company. For example, the Company’s guidelines require an initial action plan within 30 days of an assignment, a pre-mediation report within 45 days of the mediation, and a pre-trial report is due within 90 days of trial. These timelines and milestones are not arbitrary. They are important because of the need to account for the risk accurately and because of the busy schedules of the many people potentially involved in a claim. For example:

- The severity of a claim – the amount of money needed to resolve a case – may require the settlement authority which can only be granted by a home office director or officer of the Company.
- The decision to take a case to trial may need the involvement of a half dozen or more people who are not necessarily located in the same place.

The claims professional may be based in Schaumburg, Illinois, her manager may be in Phoenix, Arizona, and her manager may be in Hartford, Connecticut. Each is handling many pending files, and in some companies, a claims professional may be handling hundreds of pending files.

The Company's procedures may require internal management conferences (i.e., roundtables) to occur within a defined timeframe to authorize a case to proceed to trial. Company policy may also require cases of high severity (i.e. cases where the likely claim value exceeds \$500,000) to be escalated to a Major Case Unit. In other words, there are likely many busy eyes on the file and getting the file in front of the necessary people may present logistical challenges.

II. Reserving

This is about accounting for the risk accurately. As one author describes it:

“Case loss reserves represent an insurance company's estimate of exposure for unpaid claims. The estimate includes claims that have been reported and adjusted but not yet paid, and claims reported but not yet adjusted. In addition, a number of companies also establish allocated loss adjustment expense case reserves to reflect the anticipated cost of handling. The basic premise here is to establish dollar estimates based on a number of factors, including known facts, interpretation of loss circumstances, historical experience with similar cases, case law, and regulatory influence. Case reserves are based on the experiential estimation of anticipated pay out. As such, there is an element of uncertainty inherent within the dollar values. While multiple variations of corporate reserve philosophies exist, there is, however, one universal common denominator: timeliness.

Case reserves provide an important economic indicator of performance to the enterprise. Think of it as a financial “radar,” an early warning system so companies are not caught off guard. Part of the fiduciary responsibility of any claims department includes the timely communication of loss exposures in financial terms to decision makers, such as program managers and pricing actuaries, in order to provide them with line-of-business loss experience feedback.

Untimely or inappropriate case reserves distort the actual line of business performance or experience indicators, creating an inaccurate base upon which the actuaries forecast performance and establish rates. Loss and loss adjustment expenses are the largest cost elements of each premium dollar earned, followed by producer commissions. The rest is profit from the sale. If the price does not cover its operating costs, the company will be unable to sustain long-term operations. Pricing changes must be approved by the state within which the product is sold. The approval process takes time. In addition, price changes create potential marketplace disruption. Insurance companies make concerted efforts through planning and actuarial analyses to avoid price fluctuations that create marketplace disruptions. It is important, therefore, that case reserves

accurately reflect the anticipated exposures as soon as practicable in order to assist the actuaries in making timely and informed decisions relative to product price.” (emphasis added) Paul Swank, *Timely Case Reserving*, Property Casualty 360, April 6, 2008.ⁱ

In other words, if case reserves are untimely or inaccurate, there is potential for decreased profitability.

III. Risk Transfer

This is a corollary to appropriate reserving; how much of the risk is the Company exposed to relative to the risk that should be borne by others. For example:

- Other companies with time on risk for the same loss in continuing and progressive damages claims, such as water intrusion claims;
- Other kinds of coverages available for the same loss, for example, professional errors and omissions coverages, or builders’ risk coverages.
- Other parties such as subcontractors or material suppliers who may owe additional insurance or contractual indemnity to the insured

Transferring risk by tenders of defense to co-carriers, other carriers or other parties needs to be done immediately as many jurisdictions consider the tender of defense as the document or act which initiates the other carrier’s/party’s obligations. Tenders of defense need to be re-evaluated as pleadings change in a case especially in jurisdictions which follow the eight-corner trigger rule (duty to defend governed by the allegations in a complaint and the terms of the policy). The Company may or may not require the claims professional to initiate tenders. Ask the claims professional about the Company’s policy, and if there is no policy, ask for her/his preference.

IV. Collaborative Planning

Litigation management works best in collaboration and where the objectives and milestones are clearly stated. There should be an agreed upon, reasoned action plan to resolve the claim. Don’t assume too much and appreciate that no one likes surprises.

Analogize the litigation planning process to the work that your contractor client is expected to perform. The owner wants to know what is being built, what it will cost, and when will the work get done. It's all about scope, time and schedule. The keys to success are:

- Cut to the Chase – Separate the Wheat from the Chaff
- Find the Leverage in the Case, Promptly
- Be Fearless and Strategic
- Define the Theory of the Case
- Identify the Exit Strategy

V. Communication Protocols and Adding Value

Timely reporting according to the Company's guidelines and providing succinct information based on available data are baselines of counsel's performance. So is impact reporting, which means providing immediate updates when the liability exposure or damage assessment change. For example, the case may be worth a lot less after a really good deposition, or the liability exposure may be a lot more significant after a bad ruling on a motion. These impacts need to be reported promptly so that reserves may be adjusted, if necessary.

Beyond the basics, the claims professional should appreciate your inquiry about communication preferences. Some icebreaking conversation points include:

- Does she prefer to talk before written reports are received? Does she prefer to avoid unnecessary talking?
- Does she prefer formal letters versus emails, reporting in PDF, Word or both? Does she want you to text her on critical updates (to be followed by a report for the file)?
- Does the Company allow her to receive backup documentation by link, on a thumb drive, on a disk?
- If the Company's guidelines do not specify, how frequently does she want to be updated on the case, even when nothing much is going on. Every 30 days? Every 60 days?
- Learn what the claims professional has on her diary for follow up and when so that you can get updated information to her before she has to call or email you. Anticipate her needs by asking what they are.
- Don't make her have to hound you for information.

VI. Take Away

- Always, always, always include the claim number in the subject line of emails. The Company's computer system may be sorting the claims professional's emails into different files based on the claim number in the subject line.
- Make sure to provide a realistic and updated budget to the claim's professional, for your services and the services of the experts you retain. Even if the Company does not require a formal expert budget, get one. It is important to keep track of the costs being incurred on the file. Reflect on the accuracy of your and your expert's budgets when significant events occur, such as after scheduling discovery. Adjust the budgets as needed and send updates with a succinct explanation of why the budgets are changing (i.e., expected 4 party depositions, however, counsel just scheduled 12 depositions). On a monthly basis monitor your own fees charged, as compared to your budget, as well as the fees-to-budget of your experts.
- Consider the less-clicks concept. For example, the Company requires that you attach the plaintiff's counsel's W9 with a settlement payment request, however, your claims professional will save time and energy (and will have to click one less link if you also type in the payee name, payment amount and tax identification number into the email. The email should reiterate the payment amount due, even if that information was previously provided. Consider whether your conduct is requiring the claims professional to hunt down necessary information at some other location (a prior email, an appendix of photos at the end of a report). Make your reporting easy for her to read and to take action on the information being provided.

For a higher level of service, the following approaches have resulted in positive feedback and appreciation from claims professionals:

- Insert an Executive Summary in every writing. A succinct discussion of liability, damages and the exit strategy. Float this to the first paragraph.
- If your report is too long to read, break it down. Outline the contents.
- Use underscore or **bold** to highlight key information.
- Get to the heart of the matter. If you need to include the laundry list of defects or contract language in order to be complete, consider dropping this material into footnotes.
- Insert pictures, charts, graphs or other visuals, especially when describing a spatial condition or sequence of events.

Brevity and focus are especially important in pre-trial and trial reporting. Even if the Company's forms require 15 pages of pre-trial data, counsel should prepare an executive summary with the report (as part of the report or as a stand-alone document) to highlight the key liability and damage issues, trial theory and exit strategy. Similarly, trial reporting should succinctly report on the key testimony and rulings which may have an impact, good or bad, on the predicted liability and damage exposures. Settlement discussions in trial, should be communicated verbally, even to those who don't like to talk.

ⁱ <https://www.propertycasualty360.com/2008/04/06/timely-case-reserving/?slreturn=20190514171121>