



CLM 2015 Atlanta Conference
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What Matters in Measuring Success?

I. The role of culture

a. Why it is important to figure out what you, or your client, cares about

It has often been said that the true risk in human interaction is not in what we know but in what we think we know that is not so. An insurance company, corporation, utility, law firm, or any organization engaged in the field of litigation is, fundamentally, a service organization. Each exists to provide a level of service to stakeholders. It is not until you understand the nature of the relationship that the goal of the organization, and the kind of service needed to meet that goal, can be determined. It does little good to generate a scorched earth defense in construction defect litigation when the earth you scorch was a once vibrant business relationship between your contractor/policyholder and its principal source of income. A law firm that fails to understand the nature of this relationship may “win” its case yet lose its client. If the “client” is an insurance carrier with a corporate culture focused on preserving its policyholder’s business, it will not see this outcome as a win. In the same example, the policyholder may have desired a scorched earth effort as part of a business plan to drive its competition out of a market but the “client” carrier may not share an interest in spending the money needed to serve its policyholder’s business goals. The measured approach is to evaluate stakeholder relationships, decide with whom the principal relationship lies, and then evaluate and communicate with that stakeholder(s) to understand its goals in your specific situation, and its broader culture. Winning is about delivering outcomes that align with your clients’ culture. If you don’t understand that culture you will not effectively serve your client and it won’t be long before you no longer have to worry about it.

- II. **The challenges of figuring out what you, or your client, cares about.** We would have no trouble spending all our time discussing the many aspects of this topic. We can begin with stakeholder analysis. It is simply the question of who is “you” and who is the “client” or “stakeholder”? Answer this question and you can determine whose goals should be evaluated in crafting your defense or resolution strategies, and how you will go about the kind of data analysis that will support them.

Once you have identified your key stakeholders you must communicate. Without a clear understanding of what the stakeholders see as a successful outcome you cannot craft a strategy to deliver it. This applies just as much to a defense lawyer as it does to a carrier representative or corporate risk manager. In this area we may find a kind of institutional resistance to the idea of sharing culture beyond the doors of the particular institution. A party may even feel ethically bound to avoid the discussion, in some contexts. The stakeholder may be unsure of its own goals. The party to the relationship may have conflicting views of its organizational goals from other stakeholder contacts. Many representatives are conflict shy and may not want to voluntarily initiate a difficult conversation. The relationship may have built in objective conflicts that impede communication. It is an ongoing challenge, and a necessary task, for all parties to the relationship to have meaningful, ongoing discussion of goals, roles and processes. It is critical to keep this discussion on a professional level and to understand it is not personal. Candor and trust are critical success factors.

Assuming the parties have come to a point where meaningful communication prevails, you can then turn to the process of identifying, capturing and effectively using key performance indicators to support shared goals.

III. Once you determine what is important to you or your client, you must determine key performance metrics.

Metrics are only useful to the extent they generate specific actions which lead to effective real world success. Having come to a shared understanding of the goals and the culture that dictated them it is necessary to identify the key performance metrics that predict those goals/outcomes.

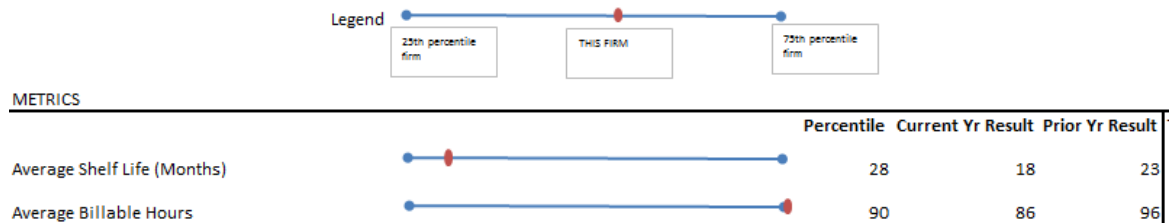
As an example of a commonly accepted key performance indicator we will look to shelf life. One carrier's analysis identified this KPI as a significant driver of case resolution strategies, expense control and most importantly, client satisfaction. Once identified it was necessary to evaluate those factors that impacted the length of time it took to resolve litigation. This rapidly became a complex discussion of the factors that drive litigation, from plaintiff and defense expectations, venue differences, lines of business, client profile, average injury profiles, and expense analysis across the entire range of transactional expense categories. A significant choke point was identified; nearly all the data needed to evaluate these factors resided in vendor systems. It then became necessary to engage with the vendors to leverage that data in a way that allowed visualization of the effects of *categories* of expense or behavior on overall outcomes. From a high level the identification of shelf life as a KPI was sufficient for an immediate return on investment, in the sense that it rapidly identified areas of concern. For example, having identified law firms whose shelf life metric was outside a standard deviation, it was then possible to engage in a discussion of litigation strategies and identify several behaviors which were driving excessive shelf life. Among

those were internal levels of aggression in settlement behavior, use of particular vendors, and a somewhat unrealistic view of in house appetite for conflict.

It is also instructive for anyone interested in having a meaningful discussion of performance in this context to recognize that the law firm vendors did not want to bring up these issues. They were of the opinion that such conversations could jeopardize the relationship with the client carrier. Conflict avoidance goes both ways. In point of fact, the candid discussion of what had been driving the excessive shelf life improved the relationship and has, not surprisingly, improved “success” in those venues.

Returning to the issue of generating useful KPI reports – you have now identified what is important to you and your client, you have identified your data, you have engaged Information Technology (IT) or other resources to access that data, and you now need to determine the best way to represent it. This will be a discussion with your litigation support team. There are vendors available to outsource this to, and there are companies capable of performing it in-house. Either solution will generate useful data if you have been open and transparent with your stakeholders. A key success factor at this point is whether you will share the data. For obvious reasons neither you nor your stakeholders may want to share data. Confidentiality and ethical rules may impact the decision. There is, however, a level of trust that can be reached and a level of information transfer that will not jeopardize the relationships or generate problems of their own. As in so many areas the answer is candid communication that respects the boundaries of the various parties. Even where the actual data is perceived as confidential it can support a conversation that gets to the specific KPI and how behavioral change could improve the metric.

It is always helpful to present data both visually and numerically, when possible. In this example, a “scorecard” sort of presentation shows how a particular firm compares to other firms for key performance indicators.



IV. The steps needed to generate useful metrics and analytic reports. Metric analysis is only useful if leads to actions which generate real world success.

V. Construction Defect Touch Points

Real world case scenario: Large condo association sues developer, builder, general contractor (GC) and all subs for construction defect. Several carriers disclaim. Almost all carriers enter defense under reservation. One of the larger carriers, by percentage of coverage and insured parties, elects to file a declaratory judgment action (dec) action instead of just defending under reservation. In this state that entitled the defended policyholder to conflict counsel. Due to conflicts among the policyholders for this one carrier, and their coverage on separate forms for two organizations, the carrier ended up hiring six law firms, all of whom worked concurrently for their separate clients to investigate, evaluate, generate pleadings and dispositive motions, and attend all court ordered hearings and mediations. The case settled about two years in. The carrier in question, while maintaining its claim of defending the policy's integrity with its dec action, was nevertheless forced to contribute nearly \$1,000,000 to settlement. This contribution was driven by average legal fees of \$150,000 submitted by each of the six firms, with no end in sight. How do you think this carrier defined success?

In line with the earlier discussion we list some of the useful questions that could be asked before arriving at this particular defense strategy:

Is general liability (GL) a significant part of the organization's market;

Do contractors and material suppliers make up a significant proportion of the organization's stakeholder base;

Having determined that the organization needs this book of business what is the legal and claims service goal;

Does the organization intend to deny coverage wherever possible, defend under reservation in every situation, or defend under reservation while pursuing a dec action;

Is the desired goal the extrication of the carrier or the defense/resolution of the claim/case against the policyholder;

Will you measure success by economy, outcome/indemnity, shelf life, customer satisfaction, customer retention, carrier expenditure, or some other key indicator;

When driving down into the stakeholder relationship will you determine if a particular outcome supports its business objectives or impedes them, gain consensus on whether aggressive defense with its higher legal transaction costs is desired, or efficient resolution targeted at assembling parties and making deals;

What is the customer's relationship with the other parties to the litigation and how will aggressive defense help or harm them;

Will you cross or counter claim against the policyholder's business partners – does that meet the service goal;

How will the carrier answer the A/I question, coverage questions, indemnity/defend questions;

Do we generate pleadings, name a bunch of experts, trade endless discovery and take endless depositions, or push for early settlement or mediation conferences?

VI. Summary

This process is a decision tree that takes you from a high level view of culture to key performance (and key results) indicators that predict the length, cost, and likely resolution envelopes for the particular case you are engaged with. Once quantified it is possible to benchmark to the larger industry to compare and contrast for competitive effect.