

2016 CLM Midwest Conference
June 23, 2016 in Omaha, NE

A Practical Guide to Managing the Defense Counsel/Insurer Relationship

I. Defining the Insurer/Defense Counsel Relationship

Claims Professionals and Defense Counsel interact on a daily basis on their mutually handled claims. This relationship requires an enormous amount of communication on the part of the Claims Professionals to assist counsel in understanding the terms of the relationship, the expected role and the expected result. It also requires counsel to communicate to the Claims Professional in an effective and efficient manner, providing necessary and useful information, and minimizing unnecessary items. We want to discuss the various roles, how the Insurer and Defense Counsel can assist each other in more effectively performing their respective roles, and work together under a shared vision of success to bring claims to resolution effectively, efficiently, economically, and expeditiously.

II. Establishing Expectations and Defining Success

A large part of a successful relationship and strategic partnership between Claims and Counsel is the management of each other's expectations. Eventually, all claims will be resolved. Either through mediation, other forms of alternative dispute resolution, summary judgment, or in 2 - 5% of the time, trial. Ensuring, from the earliest possible date, that the resolution team is strategically aligned will assist in the efficient, economical handling of the claim. Communicating roles, expectations, and distribution of work will minimize misunderstandings, allow for a free exchange of ideas, and ultimately assist the insured by bringing resolution.

Counsel must understand and appreciate the Insurers billing, reporting and other guidelines. Counsel's independent judgment and advice to the Insured is of tantamount importance. However, the joint benefits of guidelines as to handling and communication cannot be overstated. While Counsel may complain, these are necessary to ensure a smooth flow of communication both up the chain in the insurance company and down the chain back to Counsel. Counsel can assist the Claims Professional greatly by determining guidelines,

deadlines, and timelines and providing the adjuster and the Insurer with timely pertinent information to assist with the company's procedures in evaluating the claim from a legal perspective, and in determining a reasonable settlement. The attorney must always exercise independent judgment as to the legal aspect of the Insured's case, but by working together and appreciating the reporting and reserving information required from the Claims professional to his or her superiors can be extremely helpful, especially considering the number of files each adjuster is required to handle.

Defining Success

Every case has a different definition of "success". Whether that "victory" is a summary judgment, defense verdict, or \$1,000,000 settlement needs to be determined by both claims and counsel at the earliest possible moment in the life of a claim. As Counsel, it is imperative that as your relationship with the Insurer grows, you develop a firm grasp on the company's resolution philosophy. This is crucial in assist you with determining the most efficient way to resolve a claim.

Are we fighting liability claims? Is liability clear and reduction of damages becomes the main goal? Does the Insurer typically want to take advantage of early resolution opportunities such as informal mediation or settlement conferences prior to extended discovery? Does the Insurer want a full work up of liability and damages issues prior to investigating resolution opportunities? Or does the Insurer generally want to try cases that are well-disputed?

Counsel's role is to ensure the client receives a vigorous and zealous defense, while understanding that ultimately the case must be resolved. Spending hundreds of thousands of dollars for defense of a case that is worth \$50,000 does not benefit anyone but the attorney, and least of all the Insured. Early case assessment as to likelihood of success or possibility of failure must be made. All involved understand that cases can change, facts become uncovered, or new issues arise during the course of litigation. Again, if these are communicated and discussed as soon as possible, a successful resolution may still be accomplished. Since so very few cases ultimately go to trial, it is imperative to determine what is in the best interest of the client, determine the most efficient action plan to obtain necessary information, and work toward the resolution goal. The Claims Professional, Counsel, and the insured must determine a results "Comfort Zone" and work towards that outcome.

The best Insurer/Counsel relationships are results oriented. Finding the best result on a particular case for the insured leads to satisfied customers for the Insurer, and a satisfied Insurer is likely to continue to use counsel who promotes those goals.

III. Understanding Guidelines

In part because of the sheer volume of claims handled, for over twenty years, most insurers have developed a set of guidelines by which its panel counsel are provided the outline, or “ground rules” of communication and handling between the team. Counsel should not view this standardization as a burden or a yolk, rather, as a framework for the communication and free flow of information between it and the Claims Professional.

Many guidelines are patterned after the CLM Defense Counsel Guidelines or the DRI Counsel Guidelines. Both are an excellent place to help counsel develop a framework from which all cases can be handled, with generally minor modifications for different insurers.

Staffing the case properly helps case handling efficiency. Too many cooks spoil the broth. Placing the appropriate personnel on the case at the beginning helps eliminate getting multiple attorneys up to speed as to both the facts and the action plan. Appropriate non-attorney personnel helps the case economically as paralegals can generally handle many appropriate tasks, thereby minimizing defense spend.

Counsel should become intimately familiar with each insurers guidelines. While never a substitute for an attorney’s independent judgment the guidelines are set up to assist the team with communication, and any deviations should be discussed and approved prior to attorney action. Additionally, parameters on use of vendors, especially expert witnesses, should be understood and discussed early and often, to eliminate surprise and to effectively and economically resolve cases.

Billing and Budgets

Defense counsel must understand the reserve process and the important role reserving plays in the handling of claims. This requires early exposure analysis to allow the insurer to place appropriate reserves on the files. Counsel should not play “Chicken Little”. Ultimately, the best exposure analysis is one that is eventually spot-on with resolution indemnity value.

Realistic budgeting also plays a role in reserves. Counsel again should not think that budgeting a case very high and then coming in well under budget is really an effective tool. A realistic budget that is monitored and adjusted due to unforeseen circumstances, where necessary, assists the claims professionals in their inter-office analysis. Everyone knows things can change, but communication and a forward-thinking view can eliminate surprises and keep the team on task. A well-conceived budget provides counsel with an opportunity to take a full

view of the case at inception, and provide the Insurer with some level of predictability in defense spend.

Part of the benefit of the budgeting process is to determine which member of the defense team will handle various portion of the case. As noted, much initial work may be completed by competent and trained paralegals. A discussion of the distribution of work can raise the level of efficiency while at the same time minimize cost.

Metrics

Probably the most popular topic in claims management over the last few years has been Insurers' increasing use of metrics to assist in determining effectiveness of Defense Counsel and reasonableness of both defense and indemnity spend.

Counsel's understanding of by what method it is being evaluated will help with communication on handling matters. A discussion between the Claims Professional and Counsel as to what variables are important, can assist the understanding between the team and bring even greater efficiency to the process.

Counsel should become aware of cycle time, defense spend, lawyers per indemnity dollar, and verdict and settlement estimates are just a few of the many factors that may go into the determination of effectiveness of Counsel in handling claims. A frank discussion on what metrics matter to the Insurer can develop the strategic partnership and provide better results for the client. It is important to find measurable statistics to allow for both forward and backward analysis of the claims handling process, and work towards more effective means of resolving cases.

IV. Reasonable Communication and Responsiveness

Once Counsel has been engaged, it is incumbent upon them to immediately communicate with the Claims Professional, and, as reasonably quickly as possible, develop a meaningful case resolution strategy and action plan and work together to meet the goals and objectives set.

As soon as counsel has the opportunity to review the file documents, an initial conference with the Claims Professional, and the insured, should be held. Depending on the amount of information already obtained, and the life of the case, an initial discovery strategy, action plan or even resolution strategy may be agreed upon. This plan can be augmented or modified as the case evolves, but getting a strategy in place early helps to focus the defense of

the claim, thereby minimizing cost and hopefully reducing the amount of time need to resolve the case.

As noted, an important part is staffing the case appropriately and developing a reasonable budget to allow for predictability in both work product and cost. As the case progresses, counsel and Claims should regularly discuss the status, and determine whether to modify, add or subtract items from the action plan.

Reporting

A large part of the regular discussion is Counsel's reporting on the status of the case. Regular reporting of important occurrences assists the team in keeping on task, remaining agile should events or facts change, and maintaining focus on case resolution.

Depending on what study you read, between 95 and 98% of cases resolve prior to trial. Therefore, the early determination of potential liability and damage exposure and risk transfer opportunities is imperative. The earlier a resolution goal can be set, the earlier Counsel and the Claims Professional can determine the timing and value of a potential settlement.

With exposure information in hand, the team can determine whether an early mediation would be fruitful, what level of discovery is needed to get to a point of discussion of settlement, or whether the focus should be on preparing to go to trial. Frequent reporting, whether through formal reports required by Insurer guidelines, an email update, or, the simple act of picking up the phone, keeps the communication fresh and allows the team to work towards resolution.

V. Tripartite Relationship

Throughout the claims and case handling process, everyone needs to remember that Counsel's client is the insured. Counsel is duty bound to handle the case in a manner that is in the best interest of the insured, and is sometimes called to make difficult decisions that may not be popular with the entity paying her or him, the Insurer. Counsel must always focus on providing the Insured with independent advice and be zealous in representing the Insured's legal rights. Regardless, a free flow of information and discussion over the handling of the case that involves the Claims Professional, Counsel, and the insured helps ensure that all involved understand the process and keeps everyone moving towards the shared vision of resolution.

Florida, as one example, requires insurance defense counsel to send the insured a Statement of Insured Client's Rights. This specifically outlines all parties' rights and responsibilities during the case. Counsel is well-advised to have a specific conversation with the

insured regarding the tripartite relationship, so that there is no misunderstanding. Counsel must also remain aware of the policy language regarding settlement, whether the insured must be in agreement, and whether there is any Self-insured retention or deductible that may affect the insured, and the insurer's policy on collection of those amounts.

Finally, conflicts do arise. While counsel rarely, if ever, wants to give up a case, it is crucial that should a conflict arise between the insurer and the insured, it be addressed immediately.

By developing a free flow of communication between the Claims Professional and Defense Counsel, and by including the Insured in that communication, all involved understand the objectives and goals. Through this process, claims can be analyzed quickly and effectively, efficiently, economically, and expeditiously brought to resolution.