



2015 CLM Annual Conference

Palm Desert

Secrets Behind the Curtain — Tips for Carriers, Insureds and Attorneys

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I. To law firms, the audit process has historically been perceived with a sense of uncertainty.

- a. Insurance companies maintain metrics on law firms.

Law firms have been historically slow to identify what insurance companies maintain on firms in the way of metrics and have positioned themselves poorly to understand the criticisms that come from carriers on case handling and have positioned themselves poorly to prevent criticism proleptically from this lack of case management self-education. Law firms have been even slower to take the lead in developing their own metric analysis of claim handling and have failed to use their own metrics for marketing. This lack of education by law firms on insurance company metrics has shrouded the whole auditing process in uncertainty for some time for law firms. To be fair, some insurance companies have not been willing to share metric law firm data with law firms believing that such disclosure would reveal proprietary information. Other insurance companies have aggressively developed audit reports or report cards on law firm performance to help bridge the gap of this lack of understanding by law firms on insurance company metrics. See, inVoice: “Payers Are Getting More and More Sophisticated with Data” Executive Read by Invoice Prep (Nov. 2014).

- b. Results of audits on tracking of common metrics by insurance companies, i.e. indemnity paid, cost of defense and shelf life.

Survey results from a group of claims professionals show consistent tracking of indemnity paid, costs of defense and shelf life on all files. Assuming that files are grouped in appropriate tiers, categories and/or practice areas, i.e. general liability auto; commercial trucking; products, etc., the view from 35,000 feet from on law firm performance is demonstrated from this snapshot. Law firms are compared using these numbers. See; Industry Snapshot by Taylor Smith, CLM Advisors (April 2014).

- c. Remote audits, self-audits, on-site audits and billing audits.

There are several types of audits that are being performed on a routine basis for law firms:

1. Remote audits are audits that are done by the insurance company accessing its data base of the law firm file without the knowledge of the law firm. You can see the development of remote audits in conjunction with centralized filing and scanning for many insurance companies. The ability to have all the documentation from the law

firm scanned into the file improves the ability of the remote auditor to access information and to evaluate a file.

2. Self-audits are proactive and collaborative in that the insurance company seeks to have the attorney evaluate their own work and report back honestly and candidly to the insurance company in regard to their performance. This is a very educational process for the attorney as it, in the words of one claims manager, gets the attorney's "nose into the guidelines." Self-audits, however, are not a time for an attorney or a law firm to be self-congratulatory without reason as most self-audits are verified by taking a sampling of the cases that are audited by the law firm and then re-auditing those in-house for accuracy.
3. The most contentious audits historically have been thorough on-site audits of case files, personnel interviews and billing compliance where insurance companies have sent teams of auditors to review everything on-site at a firm. It is these audits that are often cited as the ones that create the greatest amount of tension between the carrier and the law firm since there is a face-to-face personal element to the review and on many occasions a request for monetary reimbursement to the insurance company is made if there are findings of non-compliance with billing guidelines.
4. Billing audits are likewise done remotely and a comparison of billing cuts between firms is commonplace.

II. The historical tension as it relates to insurance company review of lawyer billing and how this tension interferes in the tripartite relationship.

- a. The tension between the professional responsibility of the lawyer while defending an insured and the cost containment pressures of claims management.

Money may not be the root of all evil, but it has historically been the source of tension between insurance companies and their retention of outside counsel to defend insureds and reviewing lawyer billing for the defense of the insureds. Early attempts by insurance companies to audit outside counsel lawyer bills on behalf of insureds met with resistance from law firm associations and even went so far as to have many bar organizations issue opinion statements saying that disclosure of billing to third party reviewers was a breach of attorney client privilege and therefore prohibited. See; Florida Bar Staff Advisory Opinion 20591 (Dec. 1997); South Carolina Advisory Opinion 98-23; See also *U.S. v. M.I.T.*, 129 F.3rd 681 (1st Cir 1997). See, Florida Bar Journal, infra, for other examples. Understandably, billing review creates a downward pressure on attorney income and would be met with resistance on an industry wide basis. Yet on an industry wide basis, insurance companies retaining outside counsel also had price pressures and tensions to reduce outside costs to keep premium dollars low and therefore keep insureds on the books. According to Jim Cotterman at Altman & Weil (see Altman Weil blog - Cotterman on Compensation (June 9, 2014 "The long historic ability of the legal profession to raise rates well in excess of inflation year after year has largely ended.)) In addition, Cotterman states

that a law firm's ability to collect rates and the opposing forces against increases "has been on a long steady decline from 95% in 1985 to 82% recently." Tensions therefore have heightened because of the competing needs for increased rates by attorneys and decreased costs by carriers.

- b. Difficulties in the details of the audit process itself relating to billing entries by attorneys and review by auditors, i.e. inadequate descriptions, excessive time, duplicate time and administrative tasks.

Tensions in the auditing process also occur due to the human element involved in the process. Attorneys are notoriously busy individuals and prideful of their professionalism and as a result if they make a billing entry they believe that such billing entry should be accepted by any auditor as a true and correct statement of what was done unless of course there is an obvious human error in the billing process. The Florida Bar Journal in its May 1999 Volume LXXIII, No. 5 article entitled "Auditing Attorney's Bills: Legal and Ethical Pitfalls of a Growing Trend" by Claire Hamner Matturo spends significant time and research on what was called in 1999 "a growing trend" of legal audits. The article goes on to state that audits were being conducted for fear of fraud, cost cutting and enforcing billing guidelines. The article quotes the Wallstreet Journal as stating that many of America's 800,000+ lawyers "keep scrupulous time records, work as efficiently as possible and never inflate charges," but likewise are under a great deal of pressure from law firms who maintain a minimum billable hours per year employment requirements. The Florida Bar Journal identifies this issue as creating a new industry: legal auditing. So auditors and attorneys argue and quibble over adequate and inadequate descriptions, excessive or in excessive time entries, whether a time entry is duplicative or not or whether something is truly administrative in task. Auditors who may not have an understanding of the file might believe that a motion should be done through a form whereas an attorney might say that the motion was unique and required extensive legal work. One legal auditing claims professional has advised in the past that auditors are human too and some are better than others so that if there is a problem in legal auditing, it is best to have the law firm and the auditor's main contact on a positive and professional footing so that issues can be resolved.

- 3. The opportunities presented through a collaborative auditing process designed for mutual benefit and properly motivated for auditing - from the insured perspective.
 - a. An ability to develop understanding on required case handling processes.

Communication and understanding of case handling processes is the first and number one goal for all attorneys and insurers in the improvement of and focus on claims handling procedures. Insurance defense law firms often represent numerous carriers and in doing so comply with multiple litigation guideline manuals. In complying with multiple litigation guideline manuals, the burden on the law firm for strict compliance is high. Not all carriers have the same or even sometimes similar rules. As a result, many carriers are asking law

firms to have a small number individuals focus on the work of the carrier so that the learning curve in establishing proficiency in billing guidelines is minimized.

b. The development of trust between the carrier and attorney in the claim handling process.

Communication and discussion of guidelines as long as such communications and discussions are had in good faith increase the trust and minimize the tension that is presented by the inevitable mistake that occurs either at the law firm end of the billing cycle or the auditor end of the billing cycle. That trust is built by both the law firm and the billing auditor working in good faith in order to comply with billing guidelines from the law firm perspective and from the auditor's perspective to avoid arbitrary and capricious fee bill deductions.

c. Improvement issues for both the carrier and the attorney.

Communication, trust, discussion and good faith will go a long way toward improving the relationship between the carrier and the law firm from an auditing perspective and will help the law firm grow from a business perspective within the units of the insurance company referring work to the law firm. See, for instance, Above the Law: "Do You Build Invoicesor Relationships?" by Keith Lee (Aug. 29, 2014).

4. The client centric approach – making the claims handling experience more positive for the insured.

a. The motivation for litigation management by the attorney must be to provide cost effective, timely legal services for the insured.

Any other motivation by an attorney on providing legal services for the insured whether that be to meet minimum firm billing requirements, maximize personal profit, pay overhead or some other mundane monetary inducement must be disregarded by the attorney and the attorney's sole focus must be the legal representation of the insured. If the legal representation of the insured by the attorney can be done effectively while minimizing costs the benefit to the insured and the attorney's client is profound and the claims experience by the insured (client) is more positive.

b. The motivation for audits by the carrier must be to help measure and document a positive client centric (insured) experience in the claims process.

The insurance carrier enters into a contract to defend the insured and insured's defense must be paramount. Although the insurance carrier retains control on how the contract is carried out, the tension between the professional representation and the contract can be palpable in issues where defense counsel believes the effective representation of the insured requires work outside of insurance company permission. A client centric focus increases the positive claims experience for the insured.