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“Panel Counsel Performance Measurement: Understanding and Communicating How Success Is Measured”

I. Introduction

What we’ve learned about managing outside counsel from the 2015 CLM Litigation Management Study

The 2015 CLM Litigation Management Study, released last year, surveyed over 80 claims executives and asked over 100 questions. We received some great insight into the thoughts and initiatives of claims executives across the P&C industry. An overwhelming number (96%) of respondents say their organizations use a panel or panels of pre-approved firms to defend their claims litigation. At the same time, these executives indicated that insurers are consolidating their panels, making strategic decisions about the firms they wish to use for claims defense. This is creating a more competitive market for firms who must look for ways to retain or win business.

Performance measurement is a key strategic initiative for litigation professionals

We’re reaching a point in claims litigation where performance management - wherein we measure success against a defined set of criteria - is becoming a vital tool in managing panels. Yet only 64% of participants said that they formally measure their law firms’ performance. The good news is that these participants also identified law firm effectiveness and performance as a key strategic initiative.

II. Holistic performance measurement is the key to great panel management and client-firm relationships

A performance management program is not an overnight endeavor

Building a performance management program takes a good deal of forethought and necessitates a commitment from the claims litigation organization to a data-driven decision-making strategy. Key elements of a performance management program include:

- Setting goals for the program from the very beginning and adjusting those goals as new trends or ideas present themselves.

- Encouraging feedback from everyone involved, including law firms, in order to make sure the objectives are clear and attainable by those who are most affected by the program.
- Creating a program that makes sense for your organization, and starting with a manageable set of criteria to measure that can grow in the future instead of trying to boil the ocean from day one.

It is important to make sure those managing the firm/attorney relationship and the claims professionals interacting with attorneys every day buy-in to the program and the goals that were set. Many a good idea can die during execution because the lack of follow through by those involved. Successful programmatic changes are often achieved through making adoption and adaption of new initiatives part of employees' job descriptions.

Equally important to careful planning and organization buy-in is a commitment to follow through on collecting the day-to-day data that drives a holistic program. Build a way to rate your attorneys' performance into the case-closure process to ensure the feedback is captured while the experience is still fresh and relevant. The rating process should be quick and simple to encourage adoption of the process and to be as unobtrusive as possible. Encourage honest feedback and understand that ratings will average out over time as the performance management program matures.

Finally, identify tangible areas of importance for a claims department or practice area and create target metrics that your organization believes are reasonable indicators of success. Areas to consider include:

- Expense and loss ratios
- Process compliance and audit results
- Budget and reserve accuracy
- Policy holder satisfaction ratings
- Number of cases opened and closed
- Case cycle time
- Case efficiency
- Indemnity costs
- Attorney attentiveness and responsiveness
- Firm diversity
- Case outcome
- Case staffing

An effective performance measurement program calls for a mix of objective and subjective data

Measuring the success of outside counsel is a mix of art and science. Most organizations will have access to objective metrics, which is usually focused on financial data such as legal costs, expenses, case cycle times, indemnity costs, and average costs per claim/line of business/firm. This objective data is critical to understanding the bottom

line impact of a firm's performance and can indicate both positive and negative trends a claims organization should be keenly aware of, such as billing habits that may point to underlying issues that have to be dealt with.

Equally important is capturing the "soft" data of working with a firm and its attorneys – the subjective data based on the experience of the claims professionals that deal with outside counsel on a regular basis. This information, such as attorney responsiveness, proper staffing, adherence to budget, and communicativeness, fills in the gaps that financial data alone can't address. Capturing this information can help predict future behavior for firms that may be new to a panel/claims organization. For instance, good and prompt communication on smaller cases is a good indicator that a firm will be reliable on larger cases. These are important metrics that, when measured over time and considered, can contribute to the rise or fall of case assignment to panel firms.

Tracking of soft skills is especially important for mid- to small-size insurers that may feel greater repercussions from attorney behavior. For instance, an increase of \$1 million in reserve has a huge financial impact on a smaller company, and if counsel isn't quick to inform their client of this change, it could cost them their panel position. Measuring performance in these subjective areas can pinpoint if the issue is with a certain individual or firm-wide. Steps can then be taken to have a conversation and re-align performance expectations with the firm in order to correct any issues that could risk their panel inclusion.

Building a rich store of performance data allows for claims professionals to make decisions from a position of strength with an eye towards their business objectives, whether they be shortening case cycle times, trimming legal costs and expenses, negotiating alternative fee arrangements (AFAs), or making adjustments to their panels. This "actionable intelligence" goes beyond the day-to-day tasks associated with claims defense and lays a foundation for strategic decision making that is increasingly under scrutiny from executive leadership of P&C insurers.

Keep "tribal knowledge" within your claims department by capturing it – avoid letting that intelligence escape when people leave the organization

Much of the subjective data within your organization resides in the brains of your claims professionals and their relationships with their trusted attorneys/firms. Their experience with outside counsel is a vital component of day-to-day business and impacts your strategic panel management decisions. Know who your go-to attorneys are and try to capture that data in a system of record. This ensures that this intelligence is kept within the organization as people move in and out of roles, and helps claims professionals choose the right attorney for their practice area and claims defense cases.

Keep on top of ethical and fiduciary responsibilities and address concerns quickly

An effective performance management program creates a holistic picture of how a firm and its attorneys are working with its clients and raises any red flags. Billing

discrepancies, especially odd trends borne out over a period of time, may point to a lapse in ethical and fiduciary responsibility. Claims organizations who have performance data can look at how a firm has performed and billed over a large period of time. Address negative trends to determine if there are underlying issues at a firm (such as a culture of inflated billing), or if an honest mistake was made that can quickly be resolved. Strong relationships and an understanding of how a firm and its attorneys interact with your company aid in the discussion and resolution of any issues.

By implementing rigorous panel selection, management, and performance measurement practices, carriers are better able to assure its policyholders that the firm selected to defend them will do the best possible job for them, mitigating the risk of bad faith litigation.

Performance management initiatives mean opportunities for law firms to communicate their value

In the 2015 CLM Litigation Management Study, claims executives ranked their firms' ability to describe their value effectively (particularly in a way that distinguishes them from other firms), and gave an average score of 3 out of 10. While identified as an area of weakness, we believe firms should view this as an opportunity to identify their unique differentiators, communicate their value, and demonstrate an understanding of their clients' business drivers.

Participants also provided over 80 suggestions for firms, including:

- Provide metrics about their performance, provide year-end self-evaluations
- Perform their own quality control
- Be more proactive, more creative, more outside the box
- Work files for resolution, not trial
- Treat relationship as a partnership
- Demonstrate a deeper understanding of the business

These claims executives have done a great job in the Study in articulating the areas of opportunity that firms can capitalize on to deliver value. There are a lot of great firms, but firms marketing themselves as “great trial lawyers” doesn't communicate a differentiating benefit from others.. If being good has become the vanilla ice cream of practicing law in a highly competitive post-recession business environment, firms have to look at ways to uniquely differentiate themselves as long-term partners for their clients, delivering positive results for a fair price.

Building that long-term partnership is about creating and nurturing personal and professional relationships, but firms and their attorneys also need to be able to articulate why they are the best firm for their clients in ways that speak a client's language. Strive to understand the underlying business drivers for each individual P&C client, as no organization is the same and each one will have different criteria for success than the next. This goes beyond understanding litigation guidelines and necessitates a willingness

to deep dive with the client into short- and long-term goals in order to align with their client on their most important objectives.

Firms need to also consider measuring their own performance and communicate those metrics to differentiate themselves. Insurers should look at a firm's ability to take stock of its measurement capabilities and how it communicates its strengths. Do they exhibit a particular expertise in a specific product line, are they proficient at alternative dispute resolution, are they creative and thinking about new ways to communicate with and serve their clients? Performance data becomes the backbone of differentiated capabilities or individuals, and can both build and reinforce the client-firm relationship.

Firms measuring their own performance are also showing an interest in building beyond the billable hour, and looking for new avenues to solidify themselves as a client's go-to firm.

III. Communication is key to great performance and performance management

Insurers must communicate their criteria for success to their firms

Claims executives may wish to keep some of their performance measurement criteria close to the vest, but sharing the overall objectives and expectations with panel firms is essential to creating a successful program. Firms cannot meet an unknown or unclear target, and are often surprised to find out what the metrics of success are from client to client. Occasionally review and revise litigation and billing guidelines so they are clear; it is hard for firms to comply with confusing or vague guidelines. Solicit counsel feedback in order to identify gaps in the information.

While insurers work to refine their performance management programs and processes, firms need to ask what each client's success criteria is; not doing so may appear as a lack of interest or that the firm is taking the business for granted. Once those success guidelines are in place, firms should check in with their clients as needed to ensure the lines of communication are open - frequent and short status checks can uncover small issues that can be addressed and corrected before they become show-stoppers.

Bottom line for both insurers and their counsel – if you don't know, you need to ask

Insurers and their outside counsel should not be hesitant to raise questions or offer feedback in regards to performance metrics, expectations, and current status. Open, honest conversations will yield insights and remove barriers to doing business.

For a complimentary copy of the 2015 CLM Litigation Management Study, visit www.wkelmsolutions.com/CLM 2016.