CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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Panel Session 2: Thursday, April 10, 2014 (2:00 pm – 3:00 pm)

Claims Professionals are from Mars; Defense Attorneys are from Venus

In his book, "Men are from Mars; Women are from Venus", John Gray hypothesizes that the cultural differences between the sexes are what make communication difficult and challenging, even when they think they're communicating. Using the metaphor that the respective sexes are from different planets who meet on earth, he theorizes that neither really understand what the other needs and wants. We suggest that, to a certain extent, the relationships between defense counsel and claims professionals are somewhat similar. While both would likely state, as an off-the-cuff response, that they have the same goals in litigation matters, their respective priorities and interests may be different.

The defense team

In litigation matters, the defense "team" includes not only defense counsel and the claims personnel, but may also include third-party administrators, national counsel, excess carriers, the insured entity or individual, and their corporate or personal counsel. Ultimately, the key here is that this group of people and entities are, or should be, a TEAM, working together to achieve the best result possible for all team members. Each, however, may have different interests. Our discussion will focus on the "cultural" differences between claims professionals and defense counsel.

Differing Goals and Priorities

Presumably, most carriers retain defense counsel in whom they have faith and trust in their skill and judgment. Notwithstanding otherwise good and often longstanding relationships between them, claims professionals still find themselves frustrated with defense counsel from time to time in the midst of tense and often costly litigation. Likewise, few defense counsel have not occasionally wondered if the carrier truly understands some of the day-to-day problems and challenges facing defense counsel in complex litigation, and often feel second-guessed about their actions.

One would think the goal of each is the same, i.e., to "win" the case. Defense counsel, of course, are still most often paid for legal services on an hourly basis. To that end, their business IS to handle litigation

matters, and their business succeeds by having legal work to do. Not infrequently, insurance carriers have questioned whether some defense counsel are truly motivated to try to conclude cases early, or instead "milk" the files to generate whatever revenue they can. Conversely, insurance carriers generate no revenue through their claims departments. Therefore, having a claim or suit open never financially benefits the carrier. The goal of any carrier, of course, beyond closing a file without payment, is closing a file as *quickly* as may be appropriate. Loss adjustment expenses (LAE) snowball as cases linger. Therefore, the ultimate "goals" of defense counsel and claims professionals are slightly different – defense counsel would like to notch another win under their belt, whether at dispositive motion or at trial, while the carrier sees a "win" as not only closing the file without payment (or perhaps even a small indemnity payment), but as quickly as possible.

Differing Views of Facts, Evidence and Strategies

Motivated by their desire to have cases closed quickly, claims professionals often push defense counsel to pursue dispositive motions or other strategies that may potentially lead to file closure. However, there are many occasions where defense counsel feel that, strategically, there are reasons to delay certain procedural challenges, if not drop them entirely. Likewise, claims personnel may follow the "playbook" and demand changes of venue, Federal removal, or other procedural attacks that defense counsel may feel are unwise. To avoid conflict over these types of issues, defense counsel should identify that these legal challenges exist, and promptly communicate their recommendations to claims professionals early enough so that informed decisions can be made in an unhurried fashion, especially when those recommendations may seem to go against the normal grain.

Another area of conflict can arise over the issue of pursuing certain evidence or damages issues. While many carriers defer all or most strategic judgments to defense counsel, others take a more "hands on" approach, and expect to be involved in many or all strategic decisions. A few go so far as to micromanage defense counsel. It is not unusual to encounter very different perspectives on the pursuit of certain evidence, defenses or damage issues. Defense counsel frequently feel that claims personnel fail to see litigation matters as the jurors will see them, viewing all claims through their own rose-colored glasses.

Assessing case value is another area where defense counsel often feel claims personnel don't understand the nuances of litigation in their territories. Many times, cases truly are worth more or less depending on intangible factors including the venue, the judge, plaintiff's counsel, the likeability of the plaintiff or insured, etc. Yet many claims professionals view certain injury or damage claims with something of a "cookbook" mentality, and don't like being told by defense counsel that a case the claims professional has valued lower is worth a lot more.

Once again, the key to getting past these cultural divides is clear communication of thoughts, ideas and strategies, with candor and understanding of your defense partner's position, so that a useful discussion can ensue and a joint decision can be reached. Defense counsel must realize that, in the end, no matter what differences of opinion they may have with the carrier over strategic decisions, the carrier is the client, and calls the shots.

Differing Needs and Expectations.

As noted above, carriers hope to close cases quickly, to minimize LAE even where a settlement is warranted. To that end, defense counsel need to understand the information that is valuable to carriers. Key performance indicators (KPI) or other "metrics" regarding file lifespan (cycle time to closure), budgeting accuracy, etc., help carriers evaluate not only the success, but the efficiency of defense counsel. Defense counsel should be able to provide carriers with information they can use to assess counsel's ability to meet the carrier's needs and goals. With the movement industry-wide to a "paperless" world,

defense counsel need to be prepared to comply with a carrier's request for electronic transmission of all case data for those carriers who have moved that far along technologically.

One of the key expectations of any carrier is to avoid surprises. No carrier wants to be told shortly before trial that the case has changed and that for the first time settlement is warranted or that the value has increased significantly. Regular, timely and informative communication with the carrier is critical.

Differing Understanding of Defense Guidelines

Reporting to carriers is one of the most important tasks and responsibilities of defense counsel. Clarity, conciseness and timeliness in reporting are among the qualities that carriers most desire. Many defense counsel, despite having reviewed a carrier's defense guidelines, however, fail to clearly grasp why the carrier needs these qualities. In submitting their reports to the claims professional, many defense counsel fail to realize that there exists a chain of upward reporting that must and will take place, so that they claims professional "in the trenches" must be able to find the information that his/her superior will need and so on. For example, many defense counsel bury new details or case facts in a lengthy report that re-hashes old news, leaving the claims professional with the task of combing the report for new information. In an effort to develop uniformity in reporting and an ability to quickly locate information the claims professional may need, many carriers and companies have moved toward "template" reporting. In spite of developing a system for reporting that should allow defense counsel to systematically provide the key data sought by claims personnel, many defense counsel find using templates challenging and difficult. Defense counsel should recognize the importance of careful use of a carrier's report template.

Likewise, carriers and claims personnel strongly value defense counsel who can make an accurate judgment about risk and outcome, and couch their projections in definitive terms. Most defense counsel would concede that being asked to make predictions about case outcomes, damages, etc., is fraught with danger, realizing that case facts and evidence change frequently, intangible factors are somewhat immeasurable, and a key variable – who the actual jurors will be – is an unknown until the day of trial. So leads to one of the most significant cultural language problems. Carriers seek a definitive and narrow projection from defense counsel, who feel that carriers don't understand the difficulty of predicting the outcome of a trial with ongoing changing variables, and prefer to project outcomes, risk and damages in vague terms, rather than go out on a limb.

Conclusion

Understanding the cultural differences between claims professionals and defense counsel is that first step in solidifying a good working relationship. Realizing WHY another member of the defense team may need information in a certain fashion, may want to pursue a certain strategic approach, or may want details that are hard to give, will help improve the lines of communication between these team members. Ultimately, with clear and candid communication, using terms and language that each can grasp, the defense team relationship will be strengthened, which can only help the case defense in the long run.